In the Supreme Court
of the
United States

OCTOBER TERM, 1964

No. [redacted] 20

CARNATION COMPANY, a corporation,
Petitioner,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons defendants, and Federal Maritime Commission, intervener,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ARTHUR B. DUNNE
JAMES R. BAIRD, JR.
333 Montgomery Street
San Francisco 4, California

Attorneys for Petitioner
Carnation Company

SORG PRINTING COMPANY OF CALIFORNIA, 160 FIRST STREET, SAN FRANCISCO 5

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1. The other respondents are the other defendants and appellees below. Since they are fully named in paragraphs 6-8 of the Complaint which is Appendix C to this petition (App. pp. 53-67 at 55-58) the names are not repeated here.

Petitioner, a shipper by common carrier by water in *foreign* commerce, sued in the United States District Court for the Northern District of California, Southern Division, to recover, from carriers and others and two conferences of carriers, treble damages based on a $2.50 per ton tariff overcharge imposed, as an increase over the theretofore lawfully established rate, as a result of a conspiracy in violation of the antitrust statutes. On motions of defendants, before any answer was filed, and of The Federal Maritime Commission, intervener,[2] (R 23 ff, the action was dismissed *in limine* "on the grounds that primary jurisdiction of the action is in the Federal Maritime Commission" (Jud't, R 65), by reason of the Shipping Act of 1916. As in *McLean Trucking Co. v. U.S.*, 321 US 67, 79 ff (and other cases below) there was "a problem of accommodation" of an industry statute which contemplates "some diminution of competition" and possible "creation of monopolies", with a statute of general application and broad policy, the Sherman Act, making illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations". (Cf. the *Panagra Case—Pan American World Airways, Inc. v. U. S.*, 371 US 296, p. 32 ff below.)

On appeal the United States Court of Appeals for the Ninth Circuit affirmed the judgment of *dismissal* of the *action*. Petitioning for a writ of certiorari to review and correct that judgment plaintiff-petitioner respectfully shows:

I

OPINIONS BELOW

The memorandum opinion of the District Court (R 63) is not reported. It is reproduced in Appendix A hereto (App. p. 3).

The opinion of the United States Court of Appeals for the

2. The Commission did file an answer in which it was very careful *not* to deny any of the averments of the complaint. (R 36)

Ninth Circuit, (R 93, Appendix A, pp. 5-34) and its memorandum denying petitioner's petition for a rehearing, (R 123, Appendix A, pp. 35, 36) had not been reported as this petition went to the printer.

II

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked upon the ground that a federal question is presented which this Court has jurisdiction to review in that (a) the jurisdiction of the District Court was properly invoked as the action was one to recover treble damages arising under the Act of Congress of July 2, 1890, c. 647, 27 Stat. 209 as amended and particularly § 1 (the Sherman Antitrust Act, 15 USC §§ 1-7),[3] the Act of Congress of October 15, 1914, c. 323, 38 Stat. 730, as amended particularly § 4 (the Clayton Act, 15 USC §§ 12-27)[3] and Judicial Code §§ 1331 and 1337 (28 USC §§ 1331, 1337), (b) the action was dismissed by the District Court upon the asserted ground that primary jurisdiction was in the Federal Maritime Commission by reason of the Shipping Act of 1916, Act of Sept. 7, 1916, c. 451, 39 Stat. 728 as amended (46 USC § 801 ff)[3] and (c) the Court of Appeals affirmed on this ground.

The judgment of the Court of Appeals sought to be reviewed is dated July 30, 1964 (R 93, 121) and was entered on that day (R 92, 121). A petition for rehearing, filed within time, was denied on September 28, 1964 (R 122-124).

It is believed that Judicial Code § 1254(1) (28 USC § 1254(1)) confers on this Court jurisdiction to review the judgment in question by writ of certiorari.

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3. The pertinent provisions of the statutes are set out in Appendix B hereto, App. p. 38 ff.

III

THE QUESTIONS PRESENTED AND REASONS FOR GRANTING OF THE WRIT

It was not questioned that the complaint stated a claim for damages from price fixing in violation of the antitrust statutes, if they stood alone.[4] But the defendant carriers were subject to the Shipping Act of 1916 and it was claimed that the facts relied on constituted a violation of that Act and that the sole remedy was under that Act. The Court of Appeals held that if there might be a remedy under the antitrust statutes still, before it could be invoked, there were matters which must be decided by the agency charged with administration of the Shipping Act, the Federal Maritime Commission. The questions presented are:

1. Have the antitrust statutes been repealed by the Shipping Act by implication as to conduct of carriers which are subject to the Shipping Act?

2. Where conduct in violation of the antitrust statutes also violates the Shipping Act is the only remedy of a party aggrieved under the Shipping Act and, if so, might he not then improperly be deprived of a right of trial by jury?

3. Where Congress, in an industry statute (here the Shipping Act) which applies to conduct which also falls within the anti-

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4. The claim (see p. 9 ff below) was that as a result of agreement between carriers in the Far East trade the rates for carriage from the Pacific Coast were increased $2.50 per ton and plaintiff was forced to pay the increased rate. It is settled that "price-fixing agreements are unlawful *per se* under the Sherman Act" (*U.S. v. Socony-Vacuum Oil Co.*, 310 US 150, 218; *White Motor Co. v. U.S.*, 372 US 253; *No. Pac. R. Co. v. U.S.*, 356 US 1, 5). The rule applies to rates of carriers where no special immunity can be found (*United States v. Trans-Missouri Freight Ass'n*, 166 US 290; *Georgia v. Penn. R. Co.*, 324 US 439, 456; *U.S. Navigation Co. v. Cunard S.S. Co.*, 284 US 474, 480; *Isbrandtsen Co. v. U.S.*, 211 F2d 51, 57 (Cir. Dist. Col.), c.d. 347 US 990). The result is not different because the agreement was reached before the change in rate complained of was made (*Silver v. N. Y. Stock Exchange*, 373 US 341, note 5) nor because of the fact, if it be the fact, that the agreement may be one only for a veto power on change of rates (*Georgia v. Penn. R. Co.*, 324 US 439, 458).

trust statutes, has provided the means of accommodation of the two statutes and the test for determining application of the antitrust statutes, by providing in the industry statute that specified conduct is excepted from the antitrust statutes *when approved* by an administrative agency set up to administer the industry statute,[5] is not such approval the only way of denying full application of the antitrust statutes and complete availability of their remedies?

4. When the only possible issues involved in a claim for damages under the antitrust statutes are (a) whether an agreement to fix rates was made, (b) whether it was carried out to plaintiff's damage and (c) whether it was in fact not filed with and not approved by the Federal Maritime Commission, are not these classical antitrust issues to be tried by the court and which involve no questions for submission to the administrative agency charged with administration of the Shipping Act under the "primary jurisdiction" doctrine?

In deciding this cause adversely to petitioner the Court of Appeals has decided important questions of federal law concerning the operation of the antitrust statutes in fields of industry which have been subjected to some regulation by Congress[6] which have not been, but should be, settled by this Court (there is singular want of decisions on the question of accommodation when recovery of *damages* under the antitrust statutes is sought against members of a regulated industry), and has decided them in a

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5. Shipping Act, § 15, App. p. 43.

6. An important question in this case arises under the provision of Shipping Act § 15 for approval of certain agreements and thus exception from the antitrust statutes. The same question is presented under other industry statutes, for example under the Federal Aviation Act of 1958 (49 USC § 1301 ff) especially 49 USC §§ 1382 and 1384. These sections, adopted *after* the decisions in *Cunard*, 284 US 474 in 1932 and *Far East Conference*, 342 US 570 in 1952, were modeled on § 15 of the Shipping Act (*McManns v. C.A.B.*, 286 F2d 414, 419 (Cir. 2), c.d. 366 US 928).

way which is in conflict with applicable principles established by decisions of this Court. More specifically it is submitted:

(a) This action for treble damages for *past* conduct is not controlled by *U.S. Navigation Co. v. Cunard S.S. Co.*, 284 US 474 and *Far East Conference v. United States*, 356 US 570. The reasoning and holding of those cases is limited to suspension of judicial relief in specie with *prospective* operation which will trench upon administrative action in areas committed by the industry statute to an administrative agency set up to administer the statutes, and do not apply, as the *Panagra Case, Pan American World Airways, Inc. v. U.S.*, 371 US 296 was at pains to point out (see p. 34 below), to prevent free play of the antitrust statutes and their remedies where this will not in fact conflict with the performance by the administrative agency of its proper functions. A court award of damages will no more interfere with the functioning of the Federal Maritime Commission than would an award of reparations by the Commission itself under Shipping Act § 22.

(b) The decisions of this Court (particularly after *Cunard*), dealing with accommodation of the antitrust statutes with industry regulatory statutes which provide for antitrust exemption on *approval as provided*, demonstrate that the Shipping Act *(absent Commission approval under § 15)* has not displaced the antitrust statutes (*Maryland & Virginia etc. Ass'n v. United States*, 362 US 458 and other cases noticed at p. 23 ff below).

(c) Under *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285 and cases which apply its doctrine, and under the "primary jurisdiction" doctrine as fixed particularly in *United States v. Western Pac. R. Co.*, 352 US 59, *United States v. R. C. A.*, 358 US 334, *California v. Fed. Power Commission*, 369 US 482 *Panagra*, above, and *United States v. Philadelphia Nat. Bank*, 374 US 321, there is no question which must be decided by any

administrative agency before the court can proceed to decision of petitioner's action.

(d) The Court of Appeals erred in failing to heed the warning of *U. S. v. Western Pacific*, p. 25 below, that the decision of application of the doctrine of primary jurisdiction must be "based on the particular facts of each case" and, with deference, woodenly applied the holding of *Cunard* and *Far East* to a situation so different that it called upon the *court* to decide a classical antitrust question.

It is further suggested that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision" in endeavoring to support *dismissal* before answer and the framing of issues in this action, arguing (particularly in the last portion of the opinion) that there are issues for Commission decision in the teeth of clear and undenied averments of the complaint, undenied even in the answer filed by the Commission (R36).

IV

STATUTES INVOLVED

The statutes involved are:

The Sherman Act, Acts of July 2, 1890, c 647, 26 Stat. 209; Aug. 17, 1937, c 690, Title VIII, 50 Stat. 693; July 7, 1955, c 281, 69 Stat. 282, §§ 1, 2 and 8 (15 USC §§ 1, 2 and 7);

The Clayton Act, Act of October 15, 1914, c. 323, § 4, 38 Stat. 731 (15 USC § 15); and

Shipping Act of 1916, Acts of Sept. 7, 1916, c. 451, 39 Stat. 728; July 15, 1918, c. 152, 40 Stat. 900 (46 USC § 801ff) [later amended Sept. 19, 1961, Pub. L. 87-254, 75 Stat. 522].

Since the provisions are lengthy their pertinent text is set out in Appendix B, App. p. 37 ff.

V

STATEMENT OF THE CASE

A. Proceedings Below

Carnation Company commenced this action against 2 steamship "conferences" of water carriers operating from the United States to the Far East, the members of those conferences and the Chairman of each conference, to recover treble damages under the Sherman Act and the Clayton Act for violations, by the defendants, of these acts.

The jurisdiction of the District Court was invoked under §§ 1 and 2 of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, §§ 1 and 2, 15 USC §§ 1, 2), § 4 of the Clayton Act (Act of Oct. 15, 1914, c. 323, 38 Stat. 731, § 4, 15 USC §15) and §§ 1331 and 1337 of the Judicial Code (28 USC §§ 1331 and 1337). (R 9:3-9; see p. 3 above.)

All of the defendants, except one, before any other proceedings were had, appeared by motions to dismiss.[7] The Federal Maritime

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7. James A. Dennean, Chairman of the Far East Conference was not served and did not appear. Certain parties, joined as defendants by mistake, were dismissed by agreement.

The Far East Conference (FEC) and members moved to dismiss (R 23-27) upon the grounds that the complaint failed to state a claim upon which relief could be granted in that its charges constitute "violations of the provisions of the Shipping Act, 1916, as amended, which, to the extent of said acts and charges, supersedes the antitrust laws * * * the remedy * * * is that afforded by the Shipping Act, 1916, as amended" and the court "is without jurisdiction of the subject matter" in that agreements about rates are within the "exclusive jurisdiction of the Federal Maritime Commission"; the acts of defendants are subject to the jurisdiction of that Commission which is authorized to afford a remedy.

PWC, defendant Galloway, its chairman, and its members moved to dismiss (R 28-31) on the ground that the Shipping Act, 1916, as amended "provides the exclusive remedy for each and every wrong alleged by said complaint and that, as a consequence this Court is without jurisdiction to proceed as the matter is subject to the exclusive primary jurisdiction of the Federal Maritime Commission."

The Federal Maritime Commission moved to intervene "as a defendant * * * for the purpose of moving this court to dismiss" and moved to dismiss on the ground that the Shipping Act, 1916, "provides the exclusive remedy for the wrongs alleged in the complaint and therefore this honorable Court is without jurisdiction in this matter." (R 32-35)

Commission was permitted to intervene for the same purpose.[8]

With the motions the affidavit of Thomas Lisi, Secretary, Federal Maritime Commission was submitted. (R 38-56)

The court filed a memorandum opinion and order (R 63, App. p. 3) granting the motions to dismiss on the ground that the Shipping Act "provides a remedy for any violation of the Act", that "to carry out a rate agreement between carriers before approval of the Commission is an unlawful violation of the Act", the Supreme Court "has held that the antitrust laws are superseded to the extent that the Shipping Act provides a remedy" and authorities cited "are well-established precedents for applying the doctrine of exclusive primary jurisdiction to the Shipping Act in the present case."

Agreeably the court entered judgment (R 65) that

> "the court having filed herein a Memorandum of Opinion granting said Motions to Dismiss on the ground that primary jurisdiction of the action is in the Federal Maritime Commission:
>
> IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff's action be, and the same is hereby dismissed."

The plaintiff appealed. As appears above the Court of Appeals affirmed the judgment and denied a petition for rehearing (R 92 ff, App. p. 5 ff).

B. The Facts

The facts appear from plaintiff's complaint (R 6-22)[9] and are undisputed.[10] The only other material was the Lisi affidavit. (R 38-56) It is immaterial, except that Agreement 8200, the signifi-

8. See footnote 7. It also filed an Answer (R. 36).

9. The complaint is printed in full in Appendix C hereto, App. p. 53.

10. The opinion of the Court of Appeals suggests the possibility of issues of fact but no such issues are made on this record. See footnote 2 above.

cance of which will be apparent, is set out in full (R 47-56)[11] The other Lisi material has to do only with certain proceedings before the Federal Trade Commission instituted on the Commission's own motion.[12]

These are the facts (App. C):

Carnation Company, was a shipper of evaporated milk from the Pacific Coast to the Philippine Islands by defendant common carriers, members of defendant Pacific Westbound Conference (PWC) (par. 4, 5, 29).[13]

Defendant common carriers to the Far East (par. 4, 6-8) fell into 3 groups, (1) those operating only from Pacific Coast ports (par. 6), (2) those operating only from the Atlantic Coast and/or Gulf of Mexico ports (par. 7), and (3) those operating both from Atlantic Coast and/or Gulf ports and from Pacific Coast ports (par. 8). Those operating from Pacific Coast ports were the only carriers providing general cargo and regular berth service on substantially regular routes and with regular sailings and were the only carriers by whom the plaintiff could ship to Manila (par. 11, 29).

Before January 1953 the carriers from Pacific ports associated themselves under Pacific Westbound Conference Agreement No. 57 to form the Pacific Westbound Conference for the purpose, among other things, of fixing the rates at which Conference members would serve the trade. Agreement No. 57 provided *that PWC should fix the rates.* The Agreement was filed with, and approved by, the United States Shipping Board under Shipping Act, 1916,

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11. Agreement 8200 is set out in Appendix D, App. p. 69.

12. Carnation appeared but asked no monetary relief and hence none could be awarded since the proceeding was on the Commission's own motion. Shipping Act § 22 (last paragraph), App. p. 50. The statement of the Court of Appeals of the effect of § 22 is not as full as it should be (App. p. 20) although § 22 is quoted in full in note 4.

13. The paragraph references are to the Complaint, App. C.

§ 15.[14] Thereafter those rates were fixed by PWC, except as stated below. Only carriers operating from Pacific Coast ports were members of PWC. (Par. 9) No carrier operating only from Pacific Coast ports was a member of the Far East Conference (FEC). (Par. 10)

Before January 1953 the carriers from the Atlantic and Gulf ports to the Far East formed the Far East Conference (FEC) for the purpose, among other things, of fixing rates to be charged by its members. Only carriers operating from Atlantic or Gulf ports were members of FEC. No carrier operating from only Atlantic and/or Gulf ports was a member of PWC. (Par. 13)

Carriers operating from Atlantic or Gulf ports and Pacific ports were members of both Conferences. (Par. 9, 13)

Trade from the Atlantic and Gulf to the Far East was competitive with that from the Pacific Coast. PWC and FEC served different trades that were competitive and their services were competitive except as restrained as stated below (Par. 16).

In November 1952 members of PWC and FEC entered into an agreement in writing, known as Agreement No. 8200, to meet and make rules for joint action by defendants which should include "machinery for the change of any rates, rules and regulation", but which expressly provided, in paragraph Second, that PWC retained the right of independent action in respect of rates.[15] This Agreement was filed with and approved by the Federal Maritime Board. (Par. 17)

In spite of the provisions of Agreements No. 57 and 8200 that PWC should be the rate fixing agency for its members the

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14. From time to time different agencies, by statute or executive order, have been charged with administering the Act. The present agency is the Federal Maritime Commission. By the use of "Commission" we refer to it and its predecessors.

15. With deference, the statement in the opinion of the Court of Appeals that Agreement No. 8200 provided "for the joint fixing of rates by both conferences" (App. p. 6; cf also the statements at pp. 29, 31) is not correct literally or in substance. See p. 40 below.

defendants, in January 1953, met at Santa Barbara, California, and "secretly and unlawfully associated themselves together and secretly and unlawfully combined, conspired and agreed to restrain commerce with foreign nations" and to fix the rates from Pacific Coast ports to the Far East, not as provided in Agreements No. 57 and 8200, and so conspiring agreed not to disclose to shippers information with respect to rate changes, that defendants, and not PWC alone, should fix the rates for PWC members but that the rates so fixed should "then be given out and to shippers by defendant PWC falsely pretending to act as such and under Agreement No. 57", that these rates would be adhered to and that PWC would make no change in any rate without the concurrence of FEC, except rates on a "list of initiative items" which did not include evaporated milk until May, 1961. (Par. 18, 19) This association, combination and conspiracy was never submitted to the Commission and was never approved (par. 20).

In 1951 PWC, the lawful rate fixing agency under Agreement No. 57, fixed the rate for evaporated milk from Pacific Coast ports to the Philippine Islands. The defendants, under the secret and unapproved side agreement above stated, increased this rate by $2.50 per ton effective May 1, 1957, PWC announced the increase and, over plaintiff's protest, put it into effect, as though it were an increase by PWC. This rate was kept in effect until May 7, 1962. Meanwhile, in November 1957, plaintiff requested PWC to reduce the rate by $2.50 per ton to the rate it had established before May 1, 1957. PWC determined that the request should be granted but would not reduce the rate without the concurrence of FEC. FEC declined concurrence *and for that reason* the rate was not, in fact, reduced until May 7, 1962, when the rate was reduced to the rate originally fixed by PWC. (Par. 21-28)

From May 1, 1957 through May 7, 1962 plaintiff was forced to ship its evaporated milk to Manila by members of PWC and to pay the increase in rate of $2.50 per ton. It did not pass this

inrcease on and, as a result, suffered actual damage in the sum of $343,276.70. (Par. 29, 30)

In 1959 the Commission instituted an investigation into Agreement 8200 and conduct in relation to it. Carnation Co. intervened but, quite obviously, no issues here presented could be concluded there,—the Commission is given no power to adjudicate antitrust questions as such,—Carnation did not ask for reparations and monetary relief could not be awarded (see note 12 above), much less any relief by way of treble damages. The antitrust violation, price fixing, is a *per se* violation. Carnation is not here concerned with questions of discrimination, reasonableness or the like.

VI

ARGUMENT FOR ALLOWANCE OF THE WRIT

It is readily apparent that defendants' conduct can not be squared with the Sherman Act (see note 4, p. 4 above) nor with Shipping Act § 15. In such circumstances does one statute give way to the other, in whole or in part, or do both apply in full force except only that a private suitor can not elect more than one remedy and can not have more than a single satisfaction of his rights?

It is a self-evident truism that for the solution of this problem of accommodation the materials are the statutes and the nature and force of the policies underlying them.

A. The Antitrust Laws and Their Policy

The terms and policies of the antitrust laws, so far as material here, are comparatively easy of statement.

Sherman Act § 1 makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations". Clayton Act § 4 provides that "any person who shall be injured in his business or property by reason of anything forbidden

in the antitrust laws may sue therefor in any district court of the United States * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Northern Pac. R. Co. v. U. S., 356 US 1, 4, shortly and sweepingly stated the policy of the Sherman Act:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestricted interaction of competitive forces would yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even where that premise is open to question, the policy unequivocally laid down by the Act is competition."[16]

The underlying policy gives the statute such force that "immunity from the antitrust laws is not lightly implied".[17] In this context this Court has said that its "function is to see that the policy entrusted to the courts is not frustrated by an administrative agency." (*California v. Fed. P. Com'n*, 369 US 482, 485, 490)

Moreover, the Clayton Act § 4 private right of action for treble damages is designed to do more than merely provide compensation for a wrong suffered by a private suitor. It has a larger role

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16. *U. S. v. Philadelphia Nat. Bk.*, 374 US 321, after quoting *California v. Fed. Power Com'n*, 369 US 482, 485 for the proposition that "[i]mmunity from the antitrust laws is not lightly implied" adds "This canon of construction which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here."

17. *U. S. v. Philadelphia Nat. Bk.*, 374 US 321, quoting this statement (see note 16 above), said that "[i]t is settled law". *Allen Bradley Co. v. Local Union No. 3*, 325 US 797, 809, referring to the antitrust statutes, and holding the union exemption did not apply, points out: "It must be remembered that the exemptions granted to the unions were special exceptions to a general legislative plan."

of support of the underlying policy of the Sherman Act. The Clayton Act remedy "*supplements Government enforcement of the antitrust laws.*" (*U. S. v. Borden Co.*, 347 US 514, 518) The "punitive two-thirds portion of a treble-damage antitrust recovery" is "extracted from the wrongdoers as *punishment* for unlawful conduct". (*Commissioner v. Glenshaw Glass Co.*, 348 US 426, 427, 431[18]) "The treble-damage action was intended *not* merely to redress injury to an individual through the prohibited practices, *but to aid in achieving the broad social object of the statute.*"[19] (*Karseal Corp. v. Richfield Oil Corp.*, 221 F2d 358, 365 (Cir. 9)[20]). To look upon the question here presented as merely whether the plaintiff should seek a compensatory award under this Act or under the Shipping Act misses entirely this consideration of underlying policy and purpose.[21]

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18. Cf. *Powell v. St. Louis Dairy Co.*, 276 F2d 464 (Cir. 8); *No. Carolina Theatres, Inc. v. Thompson*, 277 F2d 673 (Cir. 4).

19. "The grant of a claim for treble damages to the person injured was for the purpose of *multiplying the agencies which would help enforce the antitrust laws* and therefore make them more effective." (*Kinnear-Weed Corp. v. Humble etc. Co.*, 214 F2d 891, 893 (Cir. 5), c.d. 348 US 912)

20. The case was quoting *Fanchon & Marco v. Paramount Pictures*, 100 F Supp 84, 88, (S.D. Cal.) aff'd 215 F2d 167 (Cir. 9), c.d. 348 US 912. *Karseal* further said that "The Clayton Act was part of the overall plan and the 'right of the injured party to recover damages *was intended to provoke greater respect for the Act* * * *', Maltz v. Sax, 7 Cir., 1943, 134 Fed. 2d 2, 5, cert. den. 319 U.S. 772". See the very strong opinion in *Monarch L. Ins. Co. v. Loyal etc. Co.*, 326 F2d 841 (Cir. 2), c.d. 376 US 952, quoting *Karseal*.

21. *Lawlor v. Nat. Screen Serv. Corp.*, 349 US 322, 329, speaks of "the *public interest in* vigilant enforcement of the antitrust laws *through the instrumentality of the private treble-damage action.*"

Bruce's Juices v. American Can Co., 330 US 743, 751, speaking of treble-damage actions in connection with violations of antitrust statutes said that such an action "stimulates one set of private interests to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the government of cost of enforcement. * * * It is clear Congress intended to use private self-interests as a means of enforcement and to arm injured persons with private means to retribution when it gave to an injured party

Still the private recovery has its other side. Under the antitrust statutes, once a case of damage is made, the trebling of the amount found follows "automatically" (*Clark Oil Co. v. Phillips Pet. Co.*, 148 F2d 580, 582 (Cir. 8), c.d. 326 US 734). "In this respect neither the jury nor either court had any discretion." (*Bigelow v. R. K. O. Radio Pictures*, 150 F2d 877, 883 (Cir. 7), rev. on other grounds.) By consequence, and *Flintkote Co. v. Lysfjord*, 246 F2d 368, 397 ff (Cir. 9), c.d. 355 US 835, cited in note 21, so holds, if plaintiff receives anything less than his damages *trebled* he does not receive "full satisfaction of his claim"; full damages trebled, as to plaintiffs, is the "whole to which they are entitled."[22] This

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a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee."

Flintkote Co. v. Lysfjord, 246 F2d 368, 398 (Cir. 9), c.d. 355 US 835, said: "Further, a niggardly construction of the treble damage provisions would do violence to the clear intent of Congress. The private antitrust action is an important and effective method of combatting unlawful and restructive business practices. The private suitor complements the Government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction."

In *Mach-Tronics, Inc. v. Zirpoli*, 316 F2d 820, 828 (Cir. 9), the court stated: "The provision for the recovery of treble damages by an injured party was an *important and significant feature of the entire antitrust program.*" and quoted part of the material which we have quoted from *Karseal* and from *Flintkote*.

Weinberg v. Sinclair Refining Co., 48 F Supp 203, 205 (E.D. N.Y.) and *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F Supp 796, 801 (S.D. Cal.) both refer to the treble-damage action as supplying "an ancillary force of private investigators to supplement the Department of Justice in law enforcement."

22. Three cases dealing with a parallel problem, the extent to which jurisdiction of state courts to deal with disputes arising out of labor relations survives the federal legislation dealing with labor relations, are significant.

United Construction Workers etc. v. Laburnum Const. Corp., 347 US 656;

International Association etc. v. Gonzales, 356 US 617; and *International Union etc. v. Russell*, 356 US 634.

Their significance is the importance they attach to the circumstance that the plaintiff could get *full recovery* (including *punitive* damages) only in the

is pointed out because the Court of Appeals seemed to think Shipping Act § 22 bolstered the Court's holding because under § 22 the Commission could "award full reparations" (App. p. 20). It could not award the treble damages to which petitioner is entitled under the Clayton Act.

B. Shipping Act, 1916[23]

This Act has 3 principal features, (a) provisions regulating the industry and prohibiting certain conduct, (b) a provision authorizing conference agreements and exempting them from the operation of the antitrust statutes *when approved by the administrative agency*[24] and (c) the creation of an agency to administer the statute.

In respect of the first of these 3 features, a matter of significance in this case, *Congress sharply distinguished between interstate and foreign commerce.*[25] "The regulation of water carriers in the *foreign* trade of the United States is substantially different from

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state courts, as a basis for holding that the state courts were not ousted of jurisdiction because the conduct complained of was an unfair labor practice. In *Russell* the court said

> "Punitive damages constitute a well-settled form of relief under the law of Alabama when there is a willful and malicious wrong. To the extent that such relief is penal in its nature, it is all the more clearly not granted to the Board by the Federal Acts. The power to impose punitive sanctions is within the jurisdiction of the state courts but not within that of the Board. In *Laburnum* we approved a judgment that included $100,000.00 in punitive damages."

23. We deal with it as it read before the 1961 amendments (see App. B).

24. Shipping Act § 15, App. p. 41 ff.

25. The Act, by careful definition in § 1 (46 USC § 801) makes clear the sharp distinction it is making between "foreign commerce" and "interstate commerce". (App. p. 39) The Court of Appeals overlooked this in its use of § 18 in its opinion, App. p. 30. That section applied only to *interstate* commerce and is in marked contrast with the *foreign* commerce *provision*. There was no power to fix rates in *foreign* commerce. *FMB v. Isbrandtsen,* 356 US 481, 490.

the regulation of carriers in our *domestic* trades."[26] For our purpose perhaps the principal distinction is that with respect to *foreign* commerce (unlike *interstate* commerce) the statute did *not* itself undertake direct broad regulation of rates *nor* confer upon the agency charged with administration of the statute broad power to deal with rates in *foreign* commerce.[26]

The provisions of the statute applying to *foreign* commerce, because they apply to *all* common carriers, are susceptible of summary statement.[27] The statute forbids certain specific and limited improper practices.[28] There is no provision for fixing rates in *foreign* commerce (see note 25) and the Act deals with *foreign* commerce primarily by allowing industry self-regulation through Commission approved agreements. The pivotal section is 15 (App. p. 41 ff). To insure the accommodation of this scheme with that of the antitrust statutes § 15 makes Commission approved agreements lawful and provides:

> "Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of

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26. *Empire State etc. Ass'n v. F. M. B.*, 291 F2d 336, 341 (Cir. Dist. Col.), c.d. 368 US 931. See note 25 above.

27. Compare the summary statement in *Fed. Maritime Com'n v. Isbrandtsen Co.*, 356 US 481, 490 ff.

28. The statute forbids paying or allowing "deferred rebates" (§ 14 First) and the use of "fighting ships" (§ 14 Second), has a series of provisions designed to prevent preferences and discrimination in providing service and requires that there be established and observed "just and reasonable regulations and practices" relating to the handling of property (§ 17). It contains only 2 provisions dealing expressly with rates: (a) no common carrier by water in foreign commerce shall demand or collect any rate which "is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States" (§ 17) and (b) obtaining carrier service at less than the regular rate by fraudulent means or by "any other unjust or unfair device or means" is prohibited (§ 16 and § 16 Second). Neither provision is involved in this case.

sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."[29]

Only the application and effect of this provision,—more properly failure to obtain the exception provided for,—is involved in petitioner's claim. No other regulatory provisions or exercise or want of exercise of regulatory powers of the Commission are drawn in question.[30] *This* case does *not* call for application of any assumed standard "whose application requires more than ordinary familiarity with ocean transportation" as the Court below argued. (App. p. 23)[31] This provision of § 15 is the machinery which Congress has provided for working the adjustment of the two statutory schemes which have such diverging underlying considerations and objectives. This machinery was not invoked to exclude operation of the antitrust statutes. Unlike the situation in *Cunard* and *Far East Conference* approval now will not cure the past wrong of which Carnation complains. With deference, failure to appreciate this is the root of the error of the Court of Appeals.[32] (And see p. 35 ff below.) If what was done violated the

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29. Quoted from 46 USC § 812. These sections of Title 15 USC include Sherman Act § 1, and Clayton Act § 4.

30. Even if petitioner could ask for relief under § 22 it has not elected to do so and submits that it cannot be forced to do so. See footnote 12 above dealing with the failure of the Court of Appeals fully to state the effect of § 22. Nor is the Court's statement with respect to enforcement of orders of the Commission (App. p. 20) entirely accurate, particularly in its failure to notice the provisions of § 30 (App. p. 51) in respect of orders for the *payment of money*.

31. Nothing in this case calls for determination of what would have been a "reasonable" rate. The only claim is based on collection of an illegal charge of $2.50 per ton in excess of the only *lawfully* fixed rate. No such question is here posed as was attempted in *Keogh v. C. & N. W. Ry. Co.*, 260 US 156.

32. The opinion seems saturated with a mistaken idea that the Commission can still approve the side agreement of which Carnation complains and thus eliminate the illegality. The error is repeatedly articulated by quotation from *Cunard*, 284 US 474. It is said (App. pp. 22, 23) that

antitrust statutes unless approved under § 15, and if there wa no approval, the antitrust statutes applied *and this includes th remedies they provide.* (*U.S. v. Borden Co.,* 308 US 188 an cases below at p. 23 ff.) There is no provision for *partial* exemptio if there is no approval. The opinion speaks of "a complete an egregious failure even to attempt to comply with the Shippin Act" (App. p. 34). But the Act does not contemplate degree of failure to comply. There is either approval which excepts con duct from the provisions of the antitrust statutes or there is no

C. There Is No Problem of Proper Accommodation of the Tw Statutes in This Case

The accommodation of two statutes having different underlyin policies and different effects can be accomplished in a variety o ways, and the accommodation may or may not be expressed b the legislature.

Congress contemplated that the agency would develop "considerabl expertise" and so (by quotation from *Cunard*) "it is not impossible tha although an agreement be apparently bad on its face, it properly migh upon a full consideration of all the attending circumstances, *be approve or allowed to stand with modifications.*" (This quotation is repeated at th end of note 10, and at App. p. 20, and in note 19.) In immediate sequenc it is said that the examiner has recommended approval of Agreement No 8200 after amendment. Again, in conclusion (App. p. 34), repeating th quotation from *Cunard,* the opinion says: "We would assume that if suc action were taken by the Commission *no* antitrust proceedings would b in order."

The language was proper in *Cunard.* The only relief *there* sought wa *prospective,*—injunctive relief against carrying out an unapproved agre ment,—and approval would sweep away any foundation for relief opera ing in the future, or a cease-and-desist order would obviate need for a injunction. For the same reason *Far East Conference* properly followe *Cunard.* But here approval can not have *retroactive* effect and wipe out fully accrued cause of action for damages for past unlawful conduct (*Riv Plate etc. Conf. v. Pressed Steel etc. Co.,* 227 F2d 60 (Cir 2)) and th Commission can not award the equivalent of Clayton Act relief. So far *this* case is concerned passing on the agreement is not an ingredient of an Commission authority because there is no authority for retroactive approv or to award treble damages. The court can not "usurp" Commissio authority for there is none to be usurped.

A later statute may expressly repeal an earlier statute in whole or in part. There is no express provision in the Shipping Act for repeal, in whole or in part, of any of the antitrust statutes.

What is much the same, a later statute, by force of its own expressed provisions, without other intervention or action, may except specified things (persons or conduct) from the operation of an earlier statute. No such effect is claimed for any provision of the Shipping Act.

Although there is no express repeal the provisions of two statutes may be so "absolutely irreconcilable"[33] that they can not co-exist; that the later provisions if given effect, as to the earlier statute "render its provisions nugatory."[34] There is said to be repeal by implication. The rule here is stated by *U.S. v. Philadelphia Nat. Bk.*, 374 US 321:

> "No express immunity is conferred by the [Bank Merger] Act. *Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored*[35] and have only been found in cases of *plain repugnancy* between the antitrust and regulatory provisions. Two recent cases, *Pan American World Airways, Inc. v. U.S.*, 371 US 296, 9 Led 2d 325, 83 S Ct 476, and *California v. Federal Power Com.*, 369 US 482, 8 Led 2d 54, 82 S Ct 901, illustrate this principle."[36]

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33. *U.S. v. Greathouse*, 166 US 601, 605.

34. *Texas P. R. Co. v. Abilene Cotton Oil Co.*, 204 US 426, 437.

35. At this point, in its footnote 28, the Court collects 18 of its own decisions beginning with the *Trans-Missouri Freight Association Case*, 166 US 290, 314 and coming down through *Silver v. New York Stock Exchange*, 373 US 341.

36. In *Georgia v. Penn. R. Co.*, 324 US 439, 456 where the basis for relief was price fixing by carriers in violation of the antitrust statutes this Court said:

> *"Regulated industries are not per se exempt from the Sherman Act.* United States v. Borden Co. 308 US 188, 198 et seq., 84 L ed 181, 190, 60 S Ct. 182. It is true that the Commission's regulation of carriers has greatly expanded since the Sherman Act. See Arizona Grocery Co. v. Atchison, T. & S.F. R. Co., 284 US 370, 385, 386,

Although differently phrased the respondents argued below a doctrine of "supersession" which is really repeal by implication. Since the Court of Appeals does not rest on any theory of repeal by implication this can be passed without further comments except to notice two attempted variations on the theme which this Court has rejected: A statutory administrative remedy certainly does not supersede a judicial remedy where it is not an equivalent (*Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 US 84; compare note 22 above)[37] and agency approval *for purposes of a regulatory statute*, where no power has been given to adjudicate antitrust issues or to exempt, will not exclude operation of the antitrust statutes and their remedies.

United States Alkali Export Ass'n v. U. S., 325 US 196;
U. S. v. R. C. A., 358 US 334;
California v. Fed. Power Com., 369 US 482;
U. S. v. The Philadelphia Nat. Bk., above;
U. S. v. First Nat. Bk. etc. of Lexington, 374 US 824.

Finally there are some industry regulatory statutes which, like the Shipping Act, have conferred upon the agency created to administer the statute some power to pass upon antitrust issues in the sense that the agency, by approval, can grant immunity from the antitrust statutes. The effect of failure to obtain such approval has been settled.

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76 L ed 348, 353, 354, 52 S Ct 183. But it is elementary that repeals by implication are not favored. Only a *clear repugnancy* between the old law and the new results in the former giving way *and then only pro tanto to the extent of the repugnancy*. United States v. Borden, supra, (308 US 198, 199, 84 L ed 190, 191, 60 S Ct 182)."

37. We are not to be understood as saying that if the administrative agency can give the relief sought that excludes judicial relief. There can well be dual and parallel remedies. (*U. S. v. W. T. Grant Co.*, 345 US 629. Cf. *Gt. Northern R. Co. v. Merchants Elevator Co.*, 259 US 285 and *United States Alkali Exp. Ass'n*, below.)

U.S. v. Borden Co., 308 US 188;
U.S. v. Socony-Vacuum Oil Co., 310 US 150, 226;
McLean Trucking Company v. U.S., 321 US 67;
Maryland & Virginia, etc. Ass'n v. U.S., 362 US 458;
Isbrandtsen v. U.S., 211 F2d 51, 57 (Cir. Dist. Col.), c.d. 347 US 990;
Chicago & N.W. Co. v. Peoria & Pekin etc. Co., 201 F Supp 241 (So. Dist. Ill.), aff'd 319 F2d 117 (Cir. 7), c.d. 375 US 969.

The holdings of these cases is shortly summarized in *California v. FPC*, 369 US at 485, the court referring to *Maryland & Virginia etc. Ass'n*, above, as follows:

> "We could not assume that Congress, having granted only a limited exemption from the antitrust laws, nevertheless granted an overall inclusive one."

United States v. Socony-Vacuum Oil Co., above, makes it clear that exemption from the antitrust statutes under such statutes can be obtained only through affirmative and effective action. Claimed acquiescence by government employees in the conduct in question could provide no immunity from the antitrust laws for *"Congress has specified the precise manner and method of securing immunity. None other would suffice." Isbrandtsen Co. v. U. S.*, 211 F.2d 51, 57 (Cir. Dist. Col.), c.d. 347 US 990 goes no farther than these cases but applies their reasoning to a Shipping Act case.

The doctrine of these cases is disposed of by the Court of Appeals by the simple process of ignoring it upon the ground, as best we can read the opinion, that determination of whether the exempting approval was given is not a justiciable but an administrative question and though it is alleged, and not denied, that approval was not given the suit must be dismissed because the Commission, though it is careful not to say so in its answer, might rule that approval had been given or was not necessary;

that though whether an exemption from the antitrust statutes has been given is surely an antitrust question (cf. *California v. FPC*, p. 31 below),—do the antitrust statutes apply,—and on such questions courts should not defer to administrative agencies (*California v. FPC*, above) still here because of a different decision of a different question in *Cunard* and *Far East Conference* the result is otherwise and primary jurisdiction is with the Commission to determine whether the courts have jurisdiction.

D. Accommodation of the Functions of Courts and Commission Does Not Require Dismissal of This Action

The primary jurisdiction doctrine is one that accommodates the action of courts and administrative agencies so that court action will not embarrass agency action upon administrative matters.[38] For convenience we deal with it somewhat at length, by quotation of this Court's language, because when properly understood it is clear that its use in *Cunard* and *Far East Conference*, however proper there, is no justification for reliance on it here.

The primary jurisdiction cases are cases where under the same or different statutes, an agency and the courts could have functions to perform which touch the same matter. Here the "court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other" (*U. S. v. Morgan*, 307 US 183), and the problem is to find a "mode of accommodating the complementary roles of courts and administrative agencies in the enforcement of law"

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38. Often in decisions, as in *U. S. v. The Philadelphia Nat. Bk.*, above, and *U. S. v. R. C. A.*, above, both doctrines of repeal by implication and primary jurisdiction are considered. In some cases the emphasis is largely on discussion of the primary jurisdiction doctrine.

In *The Philadelphia Nat. Bk.* case the court said that *"the considerations that militate against finding a repeal of the anti-trust laws by implication* from the existence of a regulatory scheme *also argue persuasively against attenuating, by postponing, the courts jurisdiction to enforce those laws."*

(*Far East Conference v. U. S.*, 342 US 570, 575). The doctrine is not one designed to cut down rights or reduce the ultimate relief to which a party is entitled. (Cf. *Far East Conference*, p. 37 ff below.)

Consideration of the primary jurisdiction doctrine must start with the *caveat* of *U. S. v. Western Pac. R. Co.*, 352 US 64, 69:

> "No fixed formula exists for applying the doctrine of primary jurisdiction. *In every case the question is whether the reasons for the existence of the doctrine are present* and whether the purposes it serves will be aided by its application in the particular litigation. * * * We adhere to the distinctions laid down in *Great Northern R. Co. v. Merchants Elevator Co.*, supra, which calls for *a decision based on the particular facts of each case.*"

Secondly, there must be put to one side situations where an administrative agency alone can act. The distinction was pointedly made in *United States v. Western Pac. R. Co.*, 352 US 59, 63:

> "The doctrine of primary jurisdiction, like the rule of requiring exhaustion of administrative remedies, is concerned with promoting *proper relationships between the courts and administrative agencies* charged with particular regulatory duties. *'Exhaustion'* applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. *'Primary jurisdiction'*, on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of and administrative body; in such a case the judicial process is *suspended* pending *referral* of such issues to the administrative body *for its views*. General American Tank Car Corp. v. El Dorado Terminal Co., 308 US 422, 433, 84 L ed 361, 370, 60 S Ct 325."

A leading statement is that of *U. S. v. R. C. A.*, 358 US 334, 346, where the court said of the "primary jurisdiction doctrine":

> "The doctrine originated with Mr. Justice (later Chief Justice) White in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 US 426, 51 L ed 553, 27 S Ct 350, 9 Ann Cas 1075. *It was grounded on the necessity for administrative uniformity,* and, in that particular case, for maintenance of uniform rates to all shippers. A second reason for the doctrine was suggested by Mr. Justice Brandeis in Great Northern R. Co. v. Merchants Elevator Co., 259 US 285, 291, 66 L ed 943, 946, 42 S Ct 477, where he pointed to the need for administrative skill 'commonly to be found only in a body of experts' in handling the 'intricate facts' of, in that case, the transportation industry.
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> "Thus, when questions arose as to the applicability of the doctrine to transactions allegedly violative of the antitrust laws, particularly involving *fully regulated industries* whose members were *forced to charge only reasonable rates approved by the appropriate commission,* this Court found the doctrine applicable. [39] United States v. Pacific & A. R. & Nav. Co., 228 US 87, 57 L ed 742, 33 S Ct 443; Keogh v. Chicago & N. W. R. Co. 260 US 156, 67 L ed 183, 43 S Ct 47; United States Nav. Co. v. Cunard S. S. Co. 284 US 474, 76 L ed 408, 52 S Ct 247; Georgia v. Pennsylvania R. Co. 324 US 439, 89 L ed 1051, 65 S Ct 716; Far East Conference v. United States, 342 US 570, 96 L ed 576, 72 S Ct 492. At the same time this Court carefully noted that the doctrine did *not* apply when the action was only for the purpose of dissolving the conspiracy through which the allegedly invalid rates were set, for in such a case there would be no interference with rate structures, or a regulatory scheme. United States v. Pacific & A. R. & Nav. Co. 228 US 87, 57 L ed 742, 33 S Ct 443, and Georgia v. Pennsylvania R. Co. 324 US 439, 89 L ed 1051, 65 S Ct 716, both supra. The decisions sometimes emphasized the need for administrative uniformity and uniform

39. We have pointed out above that in this case there is not and could not be as to *foreign* commerce any question of "reasonable rates approved by the appropriate commission".

rates, Keogh v. Chicago & N. W. R. Co. 260 US 156, 67 L ed 183, 43 S Ct 47, supra, while at other times they emphasized the need for administrative experience in distilling the relevant facts in a complex industry as a foundation for later court action. United States Nav. Co. v. Cunard S. S. Co. 284 US 474, 76 L ed 408, 52 S Ct 247, supra, and Far East Conference v. United States, 342 US 570, 96 L ed 576, 72 S Ct 492, supra, *as explained in* Federal Maritime Board v. Isbrandtsen Co. 356 US 481, 497-499, 2 L ed 2d 926, 937, 938, 78 S Ct 851."

In *Great Northern R. Co. v. Merchants Elevator Co.,* 259 US 285, 291, in language which has been frequently quoted, and which was relied on in *Cunard* itself, it was said that preliminary resort to the Commission

> "is required because the inquiry is essentially one *of fact and of discretion in technical matters and uniformity can be secured only if its determination is left to the Commission."*[40]

United States v. Western Pac. R. Co., 352 US 59, 64 said:

> "In the earlier cases emphasis was laid on the *desirable uniformity* which would obtain if initially a specialized agency passed on *certain* types of administrative questions. See Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 US 426. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed."

United States v. Philadelphia Nat. Bk., above, at p. 353, said:

> "We note finally, that the doctrine of 'primary jurisdiction' is not applicable here. That doctrine requires judicial abstention in cases where *protection of the integrity of a regulatory scheme* dictates *preliminary* resort to the agency which administers the scheme. See Far East Conference v United States, 342 US 570, 96 L ed 576, 72 S Ct 492; Great Northern R. Co. v. Merchants Elevator Co. 259 US 285, 66 L ed 943,

40. *Held,* that where the question was of construction of a tariff it was one of law and resort to the Commission was *not* required.

42 S Ct 477; Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv L Rev 436, 464 (1954). *Court jurisdiction is not thereby ousted,* but only postponed. See General American Tank Car Corp. v. El Dorado Terminal Co. 308 US 422, 433, 84 L ed 361, 370, 60 S Ct 325; Federal Maritime Board v. Isbrandtsen Co. 356 US 481, 498, 499, 2 L ed 2d 926, 937, 938, 78 S Ct 851; 3 Davis, Administrative Law (1958), 1-55. Thus, even if we were to assume the applicability of the doctrine to merger-application proceedings before the banking agencies, the present action would not be barred for the agency proceeding was completed before the antitrust action was commenced. Cf. United States v Western P. R. Co. 352 US 59, 69, 1 L ed 2d 126, 135, 77 S Ct 161; Retail Clerks International Asso. v. Schermerhorn, 373 US 746, 756, 10 L ed 2d 678, 685, 83 S Ct 1461. We recognize that the practical effect of applying the doctrine of primary jurisdiction has sometimes been to channel judicial enforcement of antitrust policy into appellate review of the agency's decision, see Federal Maritime Board v Isbrandtsen Co. 356 US 481, 2 L ed 2d 926, 78 S Ct 851, supra; cf. D. L. Piazza Co. v West Coast Line, Inc. 210 F2d 947 (CA2d Cir 1954), or even to preclude such enforcement entirely *if* the agency has the power to approve the challenged activities, see United States Nav. Co. v. Cunard S. S. Co. 284 US 474, 76 L ed 408, 52 S Ct 247; cf. United States v. Railway Express Agency, Inc. 101 F Supp 1008 (DC D Del 1951); but see Federal Maritime Board v Isbrandtsen Co. 356 US 481, 2 L ed 2d 926, 78 S Ct 851, supra."

We can now repeat with confidence what was said above: The primary jurisdiction doctrine is not one to reduce either the rights or remedies of a party but one which, where it applies, provides only a calendar and, as *California v. FPC,* below, holds, is no excuse for abnegation by a court of its proper functions.

It should result, *and it has resulted,* that where the reasons for application of the doctrine are not present the court *must* proceed

in ordinary course with its regular business. (*California v. Fed. Power Com'n*, p. 31 below.) As *Abilene* is the origin of the doctrine, the leading case on the limitations of the doctrine is the frequently cited and quoted case, *Great Northern R. Co. v. Merchants Elevator Co.*, p. 27 above. That, like this, was an overcharge case. The question was one of construction of a tariff, not calling for any expert appraisal of complicated accounting data (as in *U. S. v. Western Pac. R. Co.*, above[41]), and *was one of law.* No resort to the Commission was required in order to obtain uniformity. (See acc. *W. P. Brown etc. Co. v. L. & N. R. Co.*, 299 US 393) Holding that the court could proceed without prior resort to the Commission the Court said:

> "It is true that uniformity is the paramount purpose of the Commerce Act. But it is *not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission* to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff, it is one of Federal law. If the parties properly preserve their rights, a construction given by any court, whether it be Federal or state, *may ultimately be viewed by this court, either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured.*"

This language was quoted and applied in *Pan American Pet. Corp. v. Superior Court*, 366 US 656, 665, where the court brushed aside the claim that state court decisions of federal questions might destroy uniformity saying that "the right to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions."

Secondly, where (as here) there is no action which could be taken by the Commission which would be of any aid to the court,

41. The Court expressed adherence to the *Merchants Elevator Case.*

there is no room for application of the primary jurisdiction doctrine. (Cf. *U. S. v. The Philadelphia Nat. Bk.*, above.) So if a matter has been passed upon by the Commission, no further Commission action is needed and there is no reason why the court should not proceed forthwith. *U. S. v. Western Pac. R. Co.*, 352 US 59, 69, said:

> "Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it."

The court cited *Crancer v. Lowden*, 315 US 631, which was just such a case.

Thirdly, the only administrative action on which a court should wait, is *lawful* action. This results logically and from the holding in *Penn. R. Co. v. U.S.*, 363 US 202, that if a stay of court proceedings waiting upon administrative action was proper, that stay should remain in effect until the administrative proceeding was *finally* determined by the conclusion of all review proceedings.

It follows from the foregoing, and, indeed, this is the holding of the cases, that where an administrative agency can take no action or can not give *all* the relief to which a party is entitled the courts are free to proceed (*Georgia v. Penn. R. Co.*, 324 US 439; *Hewitt-Robins, Inc. v. Eastern Freight-Ways Inc.*, 371 US 84[42]).

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42. In the *Panagra case, Pan American Airways v. U. S.*, 371 US 296, in note 19 the court said: "If it were clear that there was *a* remedy in this civil antitrust suit that was *not available* in a § 411 proceeding before the C. A. B., we would have the kind of problem presented in Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 US 84, where litigation is held by a court until the basic facts and findings are first determined by the administrative agency, *so that the judicial remedy not available in the other proceedings, can be granted.*" (Italics ours)

Cf. *Heisler v. Parsons*, 312 F2d 172, 176 (Cir 7); *U. S. v. Research Laboratories*, 126 F2d 42, 45, col 2 (Cir 9).

Finally, all of the earlier cases, *Cunard* and *Far East Conference* included, must be read as limited by *California v. Federal Power Commission*, 369 US 482, and its holding that antitrust issues are *not* administrative matters unless made so by the regulatory statute. There the court said:

> "Here, as in United States v. Radio Corp. of America, 358 US 334, while 'antitrust considerations' are relevant to the issue of 'public convenience and necessity' (id. 358 US at 351), there is no 'pervasive regulatory scheme' (ibid.) *including the antitrust laws* that has been entrusted to the Commission. And see National Broadcasting Co. v United States, 319 US 190, 223, 87 L ed 1344, 1366, 63 S Ct 997. Under the Interstate Commerce Act, mergers of carriers that are approved have an antitrust immunity, as § 5(11) of that Act specifically provides that the carriers involved 'shall be and they are hereby relieved from the operation of the antitrust laws. . . .' See McLean Trucking Co v United States, 321 US 67, 88 L ed 544, 64 S Ct 370.
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> "It is not for us to say that the complementary legislative policies reflected in § 7 of the Clayton Act on the one hand and in § 7 of the National Gas Act on the other should be better accommodated. *Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency.* Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 US 426, 51 L ed 553, 27 S Ct 350, 9 Ann Cas 1075. *The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to courts is in practical effect taken over by the Federal Power Commission.*"

This should be conclusive. Any concern the Federal Maritime Commission could have had with the antitrust statutes was committed to it only in a limited way (by approval of agreement submitted to it). *Now it can no longer act upon the matter here at*

issue both (a) because it can not give retroactive approval and (b) because, in view of the 1961 amendment of the Shipping Act, it could not even give prospective approval to the rate fixing combination and agreement here involved (46 USC § 814 now expressly forbidding approval of agreements such as the secret side agreement of January 1953).

Some consideration should be given to the *Panagra Case, Pan American World Airways, Inc. v. U.S.*, 371 US 296, for the contrasts which it provides. This was a civil suit by the United States for *injunctive* relief charging violations of the Sherman Act in what amounted to division of territory and routes in foreign air commerce with South America, presenting what the court characterized as "narrow questions" which, by the Civil Aeronautics Act, so the Court held, had been entrusted to the Board.

> "The acts charged in this civil suit as anti-trust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending or rejecting them, and in allowing or disallowing affiliations between common carriers and air carriers.[43] The case is therefore quite unlike Georgia v. Penn R. Co., 324 US 439 * * *"

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43. In *U. S. v. Philadelphia Nat. Bk.*, 374 US 321, the court indicated that what was said in the language just quoted was basic to the decision of the case and stated that *Panagra* held that because the Board "had been given broad" powers to enforce the competitive standard clearly delineated by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws, the Sherman Act could not be applied "to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers." Indeed, in *Panagra* itself, footnote 19, the court said:

> "If it were clear that *there was a remedy in this civil antitrust suit that was not available in a § 411 proceeding before the C.A.B., we would have the kind of problem presented in Hewitt-Robins, Inc. v. Eastern Freight-Ways Inc.*, 371 US 84, 9 L ed 2nd 142, where litigation is held by a court until the basic facts and findings are determined by the administrative agency, *so that the judicial remedy not available in the other proceeding, can be granted.*"

Under the Civil Aeronautics Act the "industry has been regulated to a regime designed to change the prior competitive system"; "limitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme"; "Congress has committed the regulation of this industry to an administrative agency of special competence that deals only with the problems of the industry" and it, "in regulating air carriage is to deal with at least some antitrust problems."[44] It was said that the "regime" of the statute "has its special standard of the 'public interest' as defined by Congress" and "it would be strange indeed if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations". The Court reinforced its conclusion by pointing out that not only had "the narrow questions presented by this complaint been entrusted to the Board" but that they presented problems that were beyond the field of judicial action and strange to judicial competency:

> "many of the problems presented by this case, which involves air routes to and in foreign countries, may involve military and foreign policy considerations that the Act, as construed by a majority of the Court in Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp., 333 US 103, 92 L ed 568, 68 S Ct 431, *subject to presidential, rather than judicial review.* It seems to us, therefore, that the Act *leaves to the Board under § 411 all questions of injunctive relief* against the division of territories or the allocation of routes or against combinations between common carriers and air carriers."

There was such an overlapping with the antitrust statutes that *injunctive* action by the courts could very well result in a head-on

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44. "Pooling and other like arrangements are under the Board's jurisdiction by reason of § 412. Any persons affected by an order under §§ 408, 409 and 412 is 'relieved from the operation of the "antitrust laws",' including the Sherman Act § 414. The Clayton Act, insofar as it is applicable to air carriers, is enforceable by the Board."

conflict with the scheme of the Civil Aeronautics Act and the functioning of the Board to the point where action by the courts "would in effect deprive the subsequent statute of its efficacy" and "render its provisions nugatory" (see p. 21 above. But the Court was very careful expressly to point out that to the extent the subject was *not* governed by the Civil Aeronautics Act and remedies under that Act were *not* so broad as to give *all of the relief that could be obtained under the antitrust statutes,* the antitrust statutes were *not* superseded.

The Court said:

> "No mention is made of the Department of Justice and its role in the enforcement of the antitrust laws, yet we hesitate here, as in comparable situations, to hold that the new regulatory scheme adopted in 1938 was designed completely to displace the antitrust laws—*absent an unequivocally declared congressional purpose so to do.* While the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, *those expressly entrusted to it encompass only a fraction of the total.* Apart from orders which give immunity from the antitrust laws by reason of § 414, the whole criminal law enforcement problem remains unaffected by the Act. Cf. United States v. Pacific & A.R. & N. Co. 228 US 87, 105 L ed 742, 748, 33 S. Ct 443. *Moreover, on the civil side violations of antitrust laws other than those enumerated in the Act might be imagined.* We, therefore, refuse to hold that there are no antitrust violations left to the Department of Justice to enforce."

It remains to consider *Cunard* and *Far East Conference* (a) in the light of the rule that they are not to be read more widely than their facts require, both under the general rule of interpretation of judicial decisions and under the special rule in this field that the Court is not making broad general holdings but is making its decisions "based on the particular facts of each case" (*U. S. v. Western Pac. R. Co.,* p. 25 above) and (b) to consider them "as

explained in *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481, 497-499" (to borrow the language from *U.S. v. R.C.A.*, quoted at p. 27 above).

U. S. Nav. Co. v. Cunard S.S. Co., 284 US 474, was an action for *injunctive relief* against claimed violations of the Sherman Act,—conference scheme of dual rate contracts. It was held that the district court properly dismissed the action. The court said that only a few cases need be noted and started with extended quotation from *Great Northern R. Co. v. Merchants Elevator Co.*, p. 27 above. It then noticed the coverage of the Shipping Act, and that carriage by water "involves questions of exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge" and may depend on facts peculiar to the business or its history "unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced"; that the charges made "either constitute direct and basic charges of violations" of the Shipping Act or are "so interrelated with such charges as to be in effect a component part of them". Accordingly it was held, and the exact language of the Court should be carefully noticed, that:

> "the remedy is that afforded by the Shipping Act, which to *that extent* supersedes the anti-trust laws."

[This remedy might be *complete* where only relief as to the *future* is sought because under § 22 a cease-and-desist order could be issued.] Since no relief was sought for *past* acts, but *only in respect to prospective conduct*, failure to file the agreement "will not afford ground for an *injunction*" for the Board was "fully authorized by § 22, supra, to afford relief upon complaint or upon its own motion".

There is no language here of repeal, expressly or by implication, nor is there any statement of complete exclusion of the antitrust laws. It is only "to that extent" that the antitrust laws are superseded.

It was argued that the agreement referred to in the complaint was one which could not be approved. To this the Court answered "But this is by no means clear" and went on to spell out reasons for believing that there was room for action by the administrative agency. [Here, at least, the decision seems modified by the later decision in *Isbrandtsen,* 356 US 481.]

Nothing in *Cunard* stands as an impediment to court action where, as here, the only possible questions are of law, the only relief sought is damages for injury by past conduct, and there is no action which the Commission could take which would give it legality. *Cunard* is explained fully by "the particular facts" of that case. The case, whether right or wrong in view of *Isbrandtsen,* 356 US 481, goes on the ground that an *injunction* would have interfered with the performance by the Board of its functions *in respect of the very matters complained of,* and, in this at least, history has shown that the court was correct.[45]

Far East Conference v. U. S., 342 US 570, was an action by the United States *to enjoin* violation of the Sherman Law. Again the object of attack was a dual rate system. As in *Cunard* the *only* relief asked was *prospective* in operation and might interfere with Board action. Resting on primary jurisdiction and *Cunard,* the Court held that the issue should first be submitted to the Board. Its explanation of the holding in *Cunard* is interesting and makes it clear that *Cunard* was *not* a case of repeal or sole remedy, but only of prior application to avoid court and Board conflict. *Far East* said of *Cunard*:

> "The Court thus applied a principle, now firmly established, that in cases raising issues of fact *not within the conventional experience of judges* or cases requiring the exercise of administrative *discretion,* agencies created by Congress for regulating the subject matter should not be passed over. This is

45. Legislation was necessary to permit approval of a dual rate structure in view of the decision in *Isbrandtsen,* 356 US 481.

> so even though the facts after they have been appraised by specialized competence *serve as a premise for legal consequences to be judicially defined.*"

By quotation from *U. S. v. Morgan,* 307 US 183, 191, it is again made clear that the doctrine is not a one of *sole* remedy but merely of prior agency action. There is nothing to indicate that the doctrine there applied would operate where the question presented to a court is solely one of law, or where there is nothing which the administrative agency can do to affect the result, where the court is concerned only with past conduct and where no relief sought will embarrass future Commission action. *Far East* was simply applying a doctrine which would *suspend* court action to allow the administrative agency to act *if* there were an "administrative question" presented upon which the agency could act and should act, the court then to act if there was *further* relief *to which the plaintiff was entitled.* If there could be any doubt about this that doubt is resolved by the reasons given for holding that in the circumstances of *that particular case* as it *then* presented itself, the action should be dismissed rather than stayed pending Commission action. The court expressly recognized that the problem was *not one of sole or exclusive remedy* but merely one of adjustment by waiting to see what would happen. It said:

> "Having concluded that initial submission to the Federal Maritime Board is required, we may *either* order the case retained on the District Court docket pending the Board's action (citing the two *El Dorado* cases) *or* order dismissal of the proceedings brought in the District Court."

If the *sole* remedy were under the Shipping Act and by the Commission the court had *no* choice to retain the case but was required to dismiss. It ordered it dismissed only because in the situation then presented action by the agency might dispose of the matter.

However, it expressly recognized that if further relief were necessary *it could be had in a new action.* The Court reasoned:

> "If the Board's order is favorable to the United States, it can be enforced by process of the District Court on the Attorney General's application. (Citation) We believe that no purpose would here be served to hold the present action in abeyance in the District Court while the proceedings before the Board and subsequent judicial view or enforcement of its order are being pursued. *A similar suit is easily instituted later, if appropriate.*"

There is nothing in the majority opinion which remotely suggests that if there were no effective action which the Commission could take the court action should be dismissed or delayed. And, this is just what Mr. Justice Frankfurter, the author of that opinion, said in his dissent in *Isbrandtsen*, 356 US 481.

In the light of later decisions it must be noticed that Mr. Justice Clark did not participate in *Far East* and that Mr. Justice Douglas, with whom Mr. Justice Black concurred, dissented. The point of the dissent was that the dual rate agreement could have been immunized from the operation of the Sherman Act if it had been submitted to the Board and approved.

> "But that exemption from the Sherman Act can be acquired only in the manner prescribed by § 15. Here no effort was made to obtain it. Hence the petitioners are at large, subject to all of the restraints of the Sherman Act.
>
> "Why should the Department of Justice be remitted to the Board for its remedy? The Board has no authority to enforce the Sherman Act. * * *.
>
> "Petitioners, therefore, operate outside the law not only because they have failed to submit their schedule of rates to the Board but also because the rates adopted would, if approved, be illegal."

To this last statement is added a footnote: "There is less room for expertise for the rates used by the steamship companies are unfiled rates or unlawful rates." The opinion concludes:

"The jurisdiction of the Department of Justice must commence at this point, unless we are *to amend the Act by granting an anti-trust exemption* to rate fixing not only when the rates are filed by the companies and approved by the Board *but also when they are not filed at all or are rates which, if filed, could not be approved. I would read the Act as written and require the steamship companies to obtain the anti-trust exemption in the precise way Congress has provided.*"[46]

The last decision in this chapter is that in *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481 which held that the dual rate system which underlay *Cunard* and *Far East Conference* was unlawful as matter of law and beyond the power of the Commission to approve (in the course of which the Court pointed out the narrowness of the doctrine on which those cases rested), and this led Mr. Justice Frankfurter, the author of the majority opinion in *Far East Conference*, to dissent wondering (in substance) if this were so then why in *Cunard* and *Far East Conference* time was wasted sending the case to the Commission.

The Court of Appeals can not find, and in fairness it must be stated does not attempt to find, any matter which if dealt with by the court would conflict with or embarrass future Commission action (the proposition basic to the holding of *Cunard, Far East Conference* and *Panagra* and the limits of which *Panagra* is so careful to point out (p. 34 above)). But it does endeavor to find "administrative questions" calling for the exercise of Commission special expertise. In effect it says the joint increase of rates may have been approved action (apparently on the ground No. 8200 could be construed to permit fixing rates by joint action), that though Second of No. 8200 reserves to PWC the right of independent action there may have been a waiver of this right in this case, that it is for the Commission to say what agreements were

46. Compare p. 23 above.

made, and that the Commission might find the agreement for joint fixing of rates might not need Commission approval.

In saying that Agreement No. 8200 provided for the joint fixing of rates by both conferences the Court of Appeals is, with deference, in error,[47] and even if there is language which might possibly lend support to such a construction it is subject to the explicit reservation of the right of independent action in provision Second which applies to increase in rates as well as to veto of proposed reductions. But whether we are right or wrong about this, the question is, as the Court in fact came to treat it, a legal question of construction of an agreement and one for the courts not the Commission (*Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285), to be decided by the trial court in the first instance and not by the Court of Appeals as a basis for sustaining the trial court's refusal to decide it. The question is not whether in the exercise of expert discretion an agreement should be approved but only what it means. It is a matter of construction that calls into play none of the considerations enumerated in *Cunard* as well understood (*sed quaere*) by a

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47. Agreement No. 8200 is set out in full in Appednix D.

The language the Court first quotes from it (App. p. 29) is only an orienting recitation in the preamble stating the obvious that "it is essential that the parties shall, from time to time establish the rates". Nothing is said about rates being established (or changed) *only* by *joint* action of both conferences.

The language next quoted is quoted out of context from a sentence which is later incorrectly paraphrased. This sentence is in provision First and refers only to the matters "coming before the *initial* meeting for consideration and action" and even then refers *not* to matters to be determined but only to the *way* in which each conference shall act i.e. each is to act "in accordance with the procedure prescribed by its respective Conference Agreement with respect to the establishment or change of rates."

The opinion at App. p. 31 recognizes that this is the proper construction of the quoted language. This is made clear by paragraph 1 of the preamble which provides that "whenever reference is hereinafter made to action which is required or permitted to be taken by the Pacific Lines, such reference is intended to refer to *action* such as is required to effect the establishment or change of rates *pursuant to said Agreement No. 57*, as amended." Paragraph 2 is a like provision as to the Atlantic/Gulf Lines.

specially trained agency and generally unfamiliar to court. It is a matter of every day diet of courts.[48]

Even if there is room to conclude that No. 8200 provided for joint fixing of rates there is no room to question the clear reservation in Second of the right of independent action to change rates.

As to the refusal to reduce the increased rate, it appears without contradiction that PWC determined the request for reduction should be granted, requested concurrence and when this was refused,[49] although No. 8200 Second expressly reserved the right of independent action,[50] withdrew the request "agreeably to the" improper side agreement alleged in paragraph 18 of the complaint.[51]

The Court of Appeals said, however, that the "exercise of this right of independent action is discretionary"; that the Commission might hold this privilege could be waived in a particular case and that here PWC merely waived its right; that this was a single occurrence. Going outside the record it is noted in a footnote that on two occasions PWC acted independently and that this seems to negative an agreement never to act independently. The facts as alleged *and undenied* are to the contrary.

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48. *Great Northern* is not to be put aside because there the question was one of construction of a railroad tariff and here it is one of construction of an agreement. Construction of agreements is certainly more day-to-day concern with courts than is the construction of tariffs.

49. After an exchange of 13 wires, if the factual showing is to be enlarged by the examiner's report.

50. "Second" may not have been required by the Shipping Act before 1961 but it is clear that No. 8200 was not approved without it. Frank and explicit removal of it surely would have been a major modification requiring Commission approval and clandestine removal by an agreement to change only with concurrence should fare no better. The importance of the provision is pointed up by the 1961 amendment of the Shipping Act expressing the reservation of the right of independent conference action as a matter of Congressional policy.

51. Compt. par. 25. Par. 26 further alleged that plaintiff's request "was declined by reason of the refusal of defendant FEC to concur" and that the PWC statement that the action was by members of PWC was false.

The question is not whether PWC could act independently but whether PWC did *in fact* act independently or acted in pursuance of the unapproved conspiracy.[52] The latter is alleged and so far is not denied. If an issue should be made then we have the *classic* antitrust question, for jury determination, under § 1 of the Sherman Act,—was defendant's conduct the result of its independent determination of a business problem or the result of an agreement? No special agency expertise is required for the resolution of this question. It is a typical jury question in antitrust cases. And if the court below was to indulge in the very dangerous practice of going outside the record before it, it should have noticed that only the Korean incident occurred before the proceeding before the Commission was instituted (the Kraft liner board matter came later) and that *it* was a single instance of independent action although there had been from 1953 through 1959, 1666 occasions of contemplated change with requests for concurrence (714 requests by FEC and 952 by PWC), no other changes had been made without concurrence, many were long delayed waiting concurrence, 161 were not made for want of concurrence and an additional 13 requests withdrawn. In such circumstances a single failure to honor the alleged secret side agreement does not negative its existence, or at least a jury could so find.

The question of what agreements, other than No. 8200, were in fact made is not an administrative question. To determine this requires no knowledge of the history of the shipping industry or the Shipping Act or the intricacies of either. It is the typical *jury* question in every Sherman Act § 1 conspiracy case.

Finally, if there is any possible question as to whether the unapproved side agreement was of the sort required to be approved the question is one of construction of the statute and of law for

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52. Any civil conspiracy case is one where what the defendants did any one of them could have done alone and without conspiring.

the courts (*Maryland & Va. Milk P. Ass'n v. U. S.*, 362 US 458, 468). And as to past conduct there is no jurisdiction in the Commission to exercise its discretion to approve. With deference, the Court is in error in saying (App. p. 33) if a new agreement was made which required approval "exclusive primary jurisdiction is in the Board". To do what? Nothing it could do could breathe legality into what the statute (§ 15) declares to be illegal if done before approval.

CONCLUSION

It is respectfully submitted that the matter of accommodation of the provisions of the antitrust statutes providing for private actions to recover treble damages with industry regulating statutes such as the Shipping Act, calling for approval which was not asked or given, is a matter upon which this Court has not directly passed (although it spoke to this by way of setting apart civil actions in the decision in *Panagra*, p. 34 above) and is of sufficient importance to warrant review in this case to correct what is believed to be serious error.

ARTHUR B. DUNNE
JAMES R. BAIRD, JR.
Attorneys for Petitioner
Carnation Company

Appendix A

OPINIONS BELOW

In the United States District Court for the Northern District of California, Southern Division

No. 41153

Carnation Company, a corporation, *Plaintiff,*

vs.

Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, et al., *Defendants.*

MEMORANDUM OF OPINION

After careful consideration of the record and the briefs the Court has come to the following conclusions:

The Shipping Act, 46 USC Sec. 821, provides a remedy for any violation of the Act.

To carry out a rate agreement between carriers before approval of the Commission is an unlawful violation of the Act (46 USC Sec. 814).

This issue is tendered by plaintiff's complaint.

The Supreme Court has held that the antitrust laws are superceded to the extent that the Shipping Act provides a remedy. *United States Navigation Co. v. Cunard,* 284 U.S. 474 (1931); *Far East Conference v. United States,* 342 U.S. 570 (1951); See also *American Union Transport v. River Plate,* 126 F. Supp. 91 (S.D. N.Y. 1954), aff'd 222 F.2d 369 (2d Cir. 1955); *Rivoli v. New York,* 167 F. Supp. 940, 943 (S.D. N.Y. 1956); *United States v. Alaska SS Co.,* 110 F. Supp. 104 (W.D. Wash. 1952).

Although plaintiff contends that these cases are narrower in their holding and effect than they seem to indicate, this Court is of the opinion that these decisions of the Supreme Court and

decisions of other courts following them, are well-establis
precedents for applying the doctrine of exclusive primary j
diction to the Shipping Act in the present case.

The motions to dismiss, therefore, are granted and mo
parties will prepare, serve and present an order accordingly

Dated: June 20th, 1963.

/s/ W. T. SWEIGERT
United States District Jud

Filed June 21, 1963
James P. Welsh, Clerk

United States Court of Appeals for the Ninth Circuit

No. 18,926

Carnation Company, a corporation,
Appellant,

vs.

Pacific Westbound Conference, Far East Conference and the Federal Maritime Commission, et al.,
Appellees.

[July 30, 1964]

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Before: CHAMBERS, POPE and JERTBERG, Circuit Judges.

POPE, Circuit Judge.

On December 5, 1962, the appellant Carnation Company filed in the court below its complaint against Pacific Westbound Conference and Far East Conference, and numerous individual shipping lines, members of those conferences, seeking recovery of treble damages under the antitrust acts[1] on account of damages claimed to have been suffered by Carnation through an alleged unlawful combination fixing prices and rates for shipment of Carnation's manufactured products to the Philippine Islands, pursuant to agreements among them which had not been filed with

1. Jurisdiction was invoked under Sections 1 and 2 of the Sherman Act (26 Stat. 209, 15 U.S.C. Secs. 1 and 2), Section 4 of the Clayton Act (38 Stat. 731, 15 U.S.C. Sec. 15) and Secs. 1331 and 1337 of Title 28, U.S.C.

or approved by the Federal Maritime Commission.[2] This appeal is from an order dismissing the action on the ground that the matters complained of were within the primary jurisdiction of the Commission.

Each of the defendant conferences had on file with the Maritime Commission an approved agreement of the kind referred to in Sec. 15 of the Shipping Act. Pacific Westbound Conference's approved agreement known as No. *57*, was designed, among other things, to carry out the purpose of that Conference to fix the rates at which conference members would serve shippers in foreign commerce westbound from Pacific Coast ports. The Far East Conference had a similar approved agreement designated as No. *17* on the records of the Commission. In addition, the members of the two conferences had another agreement providing for joint fixing of rates by both conferences, known as No. *8200*, which was approved on December 29, 1952. The burden of the complaint of Carnation is that a certain increased rate fixed and put into effect, relating to plaintiff's product and its rates for shipping over the routes traversed by the members of the Pacific Westbound Conference, was established between the members of both conferences, not pursuant to Agreement No. *57*, nor pursuant to Agreement No. *8200*, the approved agreements, but pursuant to another agreement which was not presented to or approved by the Commission. Accordingly, it is said the fixing of that rate was a per se violation of the Sherman Act. This forms the basis for Carnation's claim for treble damages.

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2. Sec. 15 of the Shipping Act, 1916, (46 U.S.C. Sec. 814) as it read on the dates involved in this action, provided that common carriers by water shall file with the Commission a copy of every agreement with another carrier fixing or regulating transportation rates or fares controlling or regulating competition, or providing for an exclusive preferential or cooperating working arrangement; the Commission was authorized to disapprove any such agreement which it found to be unjustly discriminatory or unfair or otherwise in violation of the Act but it was required to approve all other agreements; and it provided that "every agreement . . . lawful under this section shall be excepted from the provisions of Sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."

Prior to the institution of the present action, on October 26, 1959, the Federal Maritime Board, predecessor agency to the Federal Maritime Commission,[3] ordered an investigatory proceeding entitled "No. 872, Agreement No. 8200—Joint Agreement Between the Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference" instituted pursuant to Sections 15, 16, 17 and 22[4] of the Shipping Act. The order directed that the Board "enter upon an investigation and hearing to determine whether said Agreement No. 8200 is a true and complete agreement of the parties within the meaning of said Sec. 15, and whether it is being carried out in a manner which makes it unjustly discriminatory or unfair," etc.

The Carnation Company on September 3, 1960, petitioned the Board for leave to intervene in that proceeding, and on September 8, following, leave so to intervene was granted.[5]

Hearing was had in this matter before an examiner and extensive sessions were held in San Francisco, New Orleans and Wash-

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3. When the Shipping Act of 1916 was passed it vested its administration in the United States Shipping Board. By a succession of Executive Orders this board was succeeded first by the United States Maritime Commission, then by the Federal Maritime Board, and finally by the present Federal Maritime Commission.

4. 46 U.S.C.A. Sec. 821: "Complaints to Board and investigations. Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The Board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter."

5. Other parties, including some Pacific Coast ports, also intervened, on grounds not material here.

ington. The examiner filed an initial decision on August 30, 1963, which is reported in 2 Pike & Fischer, Ship. Reg. Rep. 900. The issues presented at this hearing by Carnation and others included in general the same matters and claims set forth in Carnation's complaint in this case.

That complaint alleges that in January, 1953, defendants met at Santa Barbara, California, and then and there secretly conspired and agreed to fix rates for transportation of commodities by members of the Pacific Westbound Conference from Pacific Coast ports of the United States to the Far East "not as provided in said Agreement No. 57 and not as provided in said Agreement No. 8200", and thereafter met and secretly renewed said association and agreement and agreed as follows: (a) Neither Conference nor any member thereof "should disclose to any shipper information regarding rate changes and/or the position of either Conference or of any member of either Conference regarding rate requests;" (b) Both Conferences would fix and agree upon the rates for transportation of commodities by water by members of Pacific Westbound Conference in trade from Pacific Coast ports to the Far East including the Philippine Islands; and that the rate so fixed should be given out by Pacific West Coast "falsely pretending to act as such and under said Agreement No. 57;" (c) Pacific Westbound Conference, contrary to the provisions of Agreement 57 and Agreement 8200 would make no change in any rate established by it or fixed as aforesaid, without the concurrence of the Far East Conference with the exception of the commodities placed on a "list of initiative items", which did not include condensed or evaporated milk; that rates for evaporated milk were agreed upon and issued. The complaint further states that the Conferences and their members, acting pursuant to the agreement alleged, agreed to increase rates on evaporated milk from the United States to the Philippine Islands by $2.50 per ton, purportedly pursuant to the provisions of Agreement No. 57, and these rates were put into effect over the plaintiff's pro-

test; that this was done pursuant to the above described secret agreement which was never submitted to the Commission and that carrying it out was an unlawful combination and conspiracy in restraint of trade.

It was alleged further that in November, 1957, plaintiffs requested Pacific Westbound Conference to reduce such rate by $2.50 per ton to the rate previously established; that the Pacific Westbound Conference was willing to grant that request subject to the concurrence of the Far East Conference; that the defendant Far East Conference declined to grant such concurrence; that in advising plaintiff of its denial of the request for reduction Pacific Westbound Conference represented that the members of that Conference, after long and careful study, though initially disposed to grant a reduction, denied the same; that this statement was false in that the request for reduction was in fact declined by reason of Far East Conference's refusal to concur in the reduction; and that plaintiff did not learn of these matters until disclosure thereof was made in May, 1961, in the course of the proceedings before the Commission which is described above.

It thus appears that prior to and at the time of the institution of this action the Commission had under investigation substantially the same question as that sought to be raised by the complaint filed under the antitrust laws. The Federal Maritime Commission was granted leave to intervene in this action in the court below. Intervener and all defendants moved to dismiss the action on the ground that the Shipping Act provided the exclusive remedy for the wrongs alleged in the complaint, and that the court was without jurisdiction to proceed.[6] The motion to dismiss was granted.

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6. The motion asserted that the acts alleged in the complaint constituted charges of violations of provisions of the Shipping Act which, to the extent of such acts and charges, supersedes the antitrust laws, and that the remedy for such charges was that afforded by the Shipping Act; that the Court is without jurisdiction of the subject matter; that the practices adopted by the carrier in connection with the rates established by them are

In dismissing the action, the court below relied upon the decisions in the cases of U. S. Nav. Co. v. Cunard Steamship Co., 284 U.S. 474, and Far East Conf. v. United States, 342 U.S. 570. It seems plain to us that both of these decisions support and require the action of the court below.

In Cunard the action was brought by the Navigation Company to enjoin the respondent steamship companies from continuing an alleged combination and conspiracy in violation of the Sherman Act and the Clayton Act. The trial court there granted a motion to dismiss on the ground that the matters complained of were within the exclusive jurisdiction of the United States Shipping Board under the Shipping Act of 1916. The bill there alleged that the defendant corporations were engaged in carrying 95 percent of the cargo trade from Atlantic ports of the United States to the ports of Great Britain and Ireland and those defendants and the plaintiff were the only lines maintaining general cargo services in that trade. It was charged that the defendants had entered into a combination and conspiracy to restrain the foreign trade and commerce of the United States in respect to carriage of cargo over the routes mentioned and with the object and purpose of driving the petitioner and all others not parties to the combination out of such trade and commerce. The conspiracy was said to involve the establishment of a general tariff rate and a lower contract rate, the lower rate to be made available only to shippers who agreed to confine their shipments to the lines of the defendants. These were alleged to be coercive measures not predicated upon differences in volume or frequency of service but rather to be wholly arbitrary.

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within the exclusive jurisdiction of the Federal Maritime Commission, which is authorized to afford complete remedy with respect thereto. Attention was called to the proceeding then pending before the Maritime Commission in which substantially the same issues as those tendered by the complaint would be decided by the Commission. In support of its motion to dismiss, the Maritime Commission filed an affidavit by its Secretary setting forth portions of the record in its docket No. 872 previously mentioned.

It was conceded that looking to the Sherman Anti-Trust Act alone the bill stated a cause of action under Secs. 1 and 2 of the Sherman Act which would warrant an injunction under Sec. 16 of the Clayton Act unless the Shipping Act stood in the way. When the case reached the Supreme Court, that Court's opinion proceeded to state the provisions of the Shipping Act which it described as "a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land." (P. 480) After reviewing other decisions of the Court, and particularly the case of Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, the Court affirmed the dismissal of the action upon the ground that the matter was "within the exclusive preliminary jurisdiction of the Shipping Board."[7]

The Court reached this conclusion despite the allegation in the bill that the agreement in question had not been filed with the Board pursuant to Sec. 15 of the Shipping Act. The Court stated (p. 486): "But a failure to file such an agreement with the board

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7. The Court said: "The act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. . . .

"A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violation of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws. Compare Keogh v. Chicago & N. W. Ry. Co., supra, at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board." 284 U.S. at 485.

will not afford ground for an injunction under Sec. 16 of the Clayton Act at the suit of private parties . . . since the maintenance of such a suit, being predicated upon a violation of the antitrust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist."[8]

The Cunard case was followed by Far East Conf. v. United States, supra, decided in 1952. That also was a suit to enjoin alleged violations of the Sherman Antitrust Act but it differed from the action in the Cunard case in that this suit was brought by the United States. The violation of the Act complained of was that the defendants, the Far East Conference, and its members, had entered into an agreement establishing a dual rate system. The defendants moved that the complaint be dismissed on the ground that issues involved should properly first be adjudicated before the Federal Maritime Board rather than a district court. The Court said: "We see no reason to depart from [Cunard]. That case answers our problem."[9] The Court characterized the rationale of Cunard as follows: (342 U.S. at 574) "The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence

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8. The reasoning by which the Court arrived at this conclusion as stated in this quotation, includes a discussion of Sec. 15 of the Shipping Act. After referring to the agreements mentioned in that section the Court said: "Thereupon the board is authorized to disapprove, cancel or modify any such agreement, *'whether or not previously approved by it,'* which it finds to be unjustly discriminatory or unfair as between carriers, shippers, etc., 'or to operate to the detriment of the commerce of the United States, or to be in violation of this Act.' . . . If there be a failure to file an agreement as required by Sec. 15, the board, as in the case of other violations of the act, is fully authorized by Sec. 22 supra to afford relief upon complaint or upon its own motion." (Emphasis added.)

9. The fact that the suit was brought by the United States instead of by a private party was held no basis for distinction from the Cunard case.

serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

As noted in the dissenting opinion in Far East, although the conference agreement was approved by the United States Shipping Board, that agreement did not contain any provision for dual rates. It was the dual rate aspect of the defendants' arrangement which was the basis for the Government's antitrust suit. The dissent argued that if the Board had expressly approved the dual rate system there would be immunity from the Sherman Act, but since the agreement as put in operation had not been fully approved, the Court should not hold that the exclusive primary jurisdiction was in the Board. The Court majority did not accept that contention. In Far East, as in Cunard, exclusive primary jurisdiction was in the Board or Commission notwithstanding the questioned provisions of the agreement had not been approved by the Board.

Appellants here argue that neither Cunard nor Far East control this case, since it involves proceedings not to procure an injunction but to recover damages on behalf of a private corporation. There are two reasons why we reject that suggested distinction. In the first place, the considerations which make up the rationale of Cunard and Far East are fully as applicable in a treble damage suit as in one seeking injunction. Preliminary resort to the Commission is as necessary here in order to secure the uniformity of application of the Congressional scheme, and in order to procure resolution of the facts by a body having an adequate appreciation of the intricate business of transportation by sea. As stated in Far East (342 U.S. at 574) the Cunard case "applied

a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." Later in this opinion we shall note more fully why this is that sort of case; and it has such character no less because this suit is one for treble damages.

The second reason is the existence of authority to the contrary. The Second Circuit rejected an almost identical contention in American Union Transport v. River Plate & Brazil Conferences, 2 Cir., 222 F.2d 369, where it affirmed a dismissal of a treble damage antitrust suit on the district court's opinion, 126 F. Supp. 91.[10]

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10. Plaintiff in that case sued conference members for treble damages, alleging a conspiracy to restrain foreign trade by denying payment to plaintiff of freight brokerage. The Board had jurisdiction under the Shipping Act to include the regulation of freight forwarders and brokers, and had done so. Defendants had put into effect their procedures pursuant to an unfiled and unapproved agreement. The opinion, so adopted, followed and applied Cunard and Far East, saying: "The failure to file an agreement, . . . whatever other effect such failure may have, does not leave the offending parties 'at large', subject to the antitrust laws. If there is any inconsistency apparent between this conclusion and the language of Sec. 15 of the Shipping Act, as pointed out by Mr. Justice Douglas, the clear language of the Supreme Court authoritatively compels the decision. . . . Although the court is not asked for injunctive relief, it is not at all clear that judicial intervention in this field even to the extent of trying a case for damages would not interfere with the uniformity of treatment and the regulatory policy of the board based on specialized considerations within its exclusive competence. . . . It appears indeed, that the plaintiff has filed a complaint with the board against the present defendants asking for reparations under Sec. 22 of the act and for a cease and desist order. It is unreasonable to suggest that the plaintiff may not seek relief from the board under that section, which permits 'any person' to file a complaint. Consequently, a case is presented within the exclusive primary jurisdiction of the Federal Maritime Board." 126 F. Supp. 93.

Since the argument in this case the Second Circuit has decided Trans World Airlines v. Hughes, ... F. 2d ....., (June 2, 1964). The question presented was whether certain conduct of the defendant charged to amount to an attempt to monopolize the business of selling aircraft and aircraft supplies, was immunized from antitrust recovery because of primary jurisdiction in the Civil Aeronautics Board. Holding that such primary juris-

Appellants have attempted to demonstrate that the rule applied in Cunard and Far East would no longer be acceptable to the Supreme Court; that those cases have, because of later decisions, been interpreted to mean something different than what they seem to hold. This contention is one which we cannot accept. As late as 1963, in United States v. Philadelphia Nat. Bank, 374 U.S. 321, 353, the Court cited with apparent approval the Far East Conference case as holding that judicial abstention is required "where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." And as an inferior federal court we are not about to make rulings based on any assumption that the Supreme Court is likely to repudiate its former decisions.[11]

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diction did not exist the court noted that the acts charged in the Trans World Airlines case were not, as in Pan American World Airways v. U. S., 371 U.S. 296, "precise ingredients of the Board's authority," that the transactions charged were "unrelated to any specific function of the C A B," that the Board was given "no explicit jurisdiction" over such transactions, and that in any event the Board was without power to award money damages. Because of these circumstances the case clearly differed from that court's River Plate decision, which it did not even cite; and, for the same reason, it differs from the present case where the authority of the Maritime Commission is as broad as that stated in Cunard as follows: (284 U.S. at 487) "And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter . . . Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

11. In Penfield Co. of Cal. v. Securities and Exch. Com'n, 9 Cir., 143 F. 2d 746, 749, this court said: "We cannot agree that an inferior federal court may make its prognostication of the weather in the Supreme Court chambers, however well fortified in judicial reasoning, and forecast that the Supreme Court 'seems' about to overrule its prior decisions, and outrun that Court to the overruling goal. It is not a fanciful conjecture that, if such guessing contest were permitted, the ingenuity of judges, stirred by varied philosophies of governmental and social regulations, would find rational arguments for overruling a score of Supreme Court decisions. To the strain on the legal profession of many recent overrulings, some enumerated in the last paragraph of Smith v. Allwright, 321 U.S. 649, . . . should not be added that of the overruling prescience of ten circuit courts of appeals and upwards of ninety district courts."

We think that appellants' effort to assert the lack of continuing authority of Cunard and Far East is entirely fallacious and altogether unsupportable.[12]

Ordinarily we would be content to rest this case upon the authority of the cases we have here cited. But because of the vigor and earnestness with which appellant has argued that those cases are not controlling here, we now proceed to enumerate some of the reasons why we think the results reached in those cases were inevitable, and why the same conclusion as to exclusive primary jurisdiction in the Commission must be upheld here.

THE SHIPPING ACT'S PERVASIVE REGULATORY SCHEME

In the first place, when we consider the powers and authority of the Commission, we must note that under the Shipping Act,

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12. There is little point in attempting to spell out the manner in which this portion of appellant's argument proceeds. In general outline it is as follows: In his dissent in the Far East Conference case, Justice Douglas took the position that exclusive primary jurisdiction in the Commission did not apply to unfiled agreements, and that the dual rate agreement there involved was unapprovable under Sec. 14 of the Shipping Act.

In Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, at 500, Mr. Justice Frankfurter, who had written the opinion in Far East Conference, dissented from the majority opinion which held that particular approved agreement providing for a dual rate system to be in violation of Sec. 14 of the Shipping Act, saying (at 522): "In both cases [Cunard and Far East Conference] the Court's attention was directed to the claim of *per se* illegality. In both cases the plaintiffs urged that, since the dual-rate contract system violated Sec. 14, the Board was without power to approve it. . . . And in *Far East Conference*, the claim that now prevails was a main ground of dissent." Appellant contends that what Mr. Justice Frankfurter thus said in this Isbrandtsen case demonstrates that the majority in Isbrandtsen were reversing and rejecting Cunard and Far East Conference. It must be manifest that appellant's attempt to draw that conclusion from a dissenting opinion must be a fruitless one. This was noted by Mr. Justice Harlan in a separate dissent in that case who disagreed with what Mr. Justice Frankfurter's dissent said about Cunard and Far East Conference. The Isbrandtsen case had nothing to do with the present problem of exclusive primary jurisdiction in the Commission. That case reached the court of appeals and then went on to the Supreme Court on a petition to review a decision of the Federal Maritime Board. It had nothing to do with an attempted suit under the antitrust laws; it dealt solely with the question of the legality of a dual rate system. No issue relating to a dual rate system is before us in the present case.

as it was at the time of the matters alleged in the complaint, (and also as it is today), the Commission had, in contrast with the banking agencies in United States v. Philadelphia Nat. Bank, supra, (374 U.S. at 351) "regulatory and remedial powers." In contrast with the powers of the Federal Power Commission in California v. Fed. Power Comm'n., 369 U.S. 482, 485, those granted to the Maritime Commission composed a "pervasive regulatory scheme." The following summary of the provisions of the Shipping Act discloses the extremely broad range of regulatory powers, particularly as concerns shipping in foreign trade, vested in the Commission.[13] "The Act prohibits: (1) deferred rebates, (2) 'fighting ships,' (3) retaliation or discrimination against any shipper, and (4) unfair or unjustly discriminatory contracts with any shipper. A fine of not more than $25,000 for each offense is provided as the penalty for a breach of these provisions. If water carriers—other than citizens of the United States—violate the foregoing provisions or deny an American common carrier admission to a conference on equal terms with all other parties, the Secretary of Commerce, upon certification by the Board, is empowered to bar vessels of the offending parties from United States ports.

"All agreements, understandings, conferences, or other arrangements between parties subject to the act which affect competition in any way, or changes in earlier agreements, must, according to Section 15 of the 1916 act, be filed with the Board. The Board, furthermore, may disapprove, cancel, or modify any such agreement or modification thereof deemed to operate to the detriment of United States commerce, to be in violation of the act or to be

13. Since the complaint here refers to acts and things alleged to have been done by the defendants between "before January, 1953" (including November, 1952) to and including May, 1961, we have chosen to describe the powers of the Commission under the Shipping Act as that Act existed prior to the amendments of October 3, 1961, Pub. L. 87-346, 75 Stat. 762. A consideration of the 1961 amendments would lead to no different conclusion than that we reach here.

'unjustly discriminatory or unfair' between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. Approved agreements are exempted from the anti-trust laws. Violators are subject to a fine of $1,000 for each day of the offense.

"It is unlawful: (1) to give unreasonable preference to any person, locality, or description of traffic, or to subject any of the foregoing to undue disadvantage; (2) to permit by false billing, weighing, etc., transportation at less than regular rates; (3) to influence insurance companies to discriminate against a competitor; and (4) to disclose information detrimental to shippers or consignees. It is also unlawful for any shipper, consignor, or consignee to obtain or attempt to obtain by false billing, false weighing, etc., rates less than otherwise applicable. A fine of not more than $5,000 is provided for each offense.

"The charging of rates or fares that are 'unjustly discriminatory' between shippers or ports, or 'unjustly prejudicial' to United States exporters compared to their foreign competitors, is prohibited, and the Commission is empowered to alter rates which are in violation of this section. Reasonable regulations covering practices relating to receiving, handling, storing, or delivery of property must be observed, and the Board has authority to require the filing of reports, records, etc., of any person subject to the Act. The Board is also authorized to investigate any violation of the act on its own volition, or upon the filing of a complaint. In the latter case full reparation for injury may be awarded if the complaint is filed within two years of the cause of action."[14]

A key provision of the Act, significant here, is Sec. 15 (46 U.S.C. Sec. 814) which provides that common carriers and conferences thereof, such as the defendants in this case, shall file their agreements for regulating transportation or rates, or con-

14. This quoted summary is from Marx, International Shipping Cartels: A Study of Industrial Regulation by Shipping Conferences, pp. 106-107.

trolling competition, or providing for cooperative working arrangements, with the Commission. The section, as it read at the time here in question, is set forth in the margin.[15] In brief, it authorizes the Board to "disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it" that it finds to be unjustly discriminatory or unfair and the Commissioner is required to approve all other agreements. It makes such agreements lawful only when

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15. "Sec. 814. Contracts between carriers filed with Board. Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

and as soon as approved by the Board, and makes it unlawful to carry out an unapproved agreement. It provides that agreements lawful under the section shall be excepted from the provisions of the antitrust laws and provides a penalty of $1,000 for each day of violation continuance.

Another key section is section 22 (46 U.S.C. Sec. 821) which is set forth in full in footnote 4, supra. It is this section which provides for the filing of complaints with the Commission alleging violation of the Act and asking reparation for the injury caused thereby. The Commission shall investigate complaints and shall make such orders as it deems proper; it is authorized to award full reparations to the complainant. The Board may on its own motion investigate any violation of the Act and make similar orders with respect thereto.

The Act provides for full hearing in relation to any complaint or proceeding pertaining to violations of the Act, for the keeping of records of the Board, and for publication of its reports; it authorizes enforcement of the orders of the Board by district court order, and provides for a review or setting aside of orders by the appropriate court.[16] In the exercise of its "regulatory and remedial powers" to enforce the Act's "pervasive regulatory scheme", it is for the Commission to pass upon the following questions: whether the defendants did or did not make certain agreements, whether those agreements, if made were such as to require Commission approval, whether such agreements, if not filed, should nevertheless, now, in the language of the Cunard case, "upon a full consideration of all the attending circumstances, be approved or allowed to stand with modification." These are, as we shall more fully note hereafter, "precise ingredients of the [Commission's] authority." Pan American World Airways v. U. S., 371 U. S. 296, 305.

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16. Since 1950 review of the Commission's orders is by courts of appeals under Chapter 19A of 5 U.S.C. Secs. 1031 to 1042.

TO ESTABLISH A CONTROLLED SYSTEM OF AGREEMENTS DESIGNED TO LIMIT COMPETITION

Another reason why we think it must have been the congressional intention, as held in the cases previously cited, that exclusive primary jurisdiction should rest with the Maritime Commission, is that the congressional objectives in the passage of the Shipping Act were entirely different from the objectives designed to be obtained through the antitrust acts. In the case of the latter, the congressional purpose was, as has been so often noted, to preserve, protect and enforce full and free competition. But the legislative history of the Shipping Act discloses that Congress had in mind in that enactment a very different objective due to the special problems of shipping lines in foreign trade which called for a special and different mode of regulation than that provided by the antitrust laws.

The Alexander Report[17] which led to the enactment of the Shipping Act, discloses that the object of the Act was to permit a controlled system of agreements designed to *limit* competition.[18]

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17. House Com. on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliation in the American Foreign and Domestic Trade, 4 H.R. Doc. No. 805, 63d Cong. 2d Sess. (1914) pp. 415 to 421.

18. The Committee noted that it had been the almost universal practice for steamship lines engaged in the American foreign trade to operate under the terms of agreements or understandings which had for their purpose the regulation of competition through fixing or regulating of rates, apportionment of traffic, the pooling of earnings, or meeting the competition of non-conference lines. The Committee considered two alternatives: either the prohibition of such agreements with a view to "attempting the restoration of unrestricted competition" or recognizing such agreements and permitting them under circumstances which would eliminate abuses. The Committee noted the advantages and disadvantages of these alternative proposals, and concluded that the advantages which were substantial, "can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under government supervision and control." The Committee observed that "to terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the

In these respects it was similar to certain portions of the Federal Aviation Act, concerning which the Court said in Pan American World Airways v. U. S., supra, at p. 301: "Since 1938, the industry has been regulated under a regime designed to change the prior competitive system." The objective of limiting competition led to the provision in Sec. 15 that agreements lawful under that section "shall be excepted from the provisions of Secs. 1-11 and 15 of Title 15."

In Cunard the Court noted that the proper place to determine whether this special regime designed to change the prior competitive system should be effective was before the board.[19]

UNDER DIRECTION OF A COMMISSION SPECIALIZING IN OCEAN TRANSPORTATION

Another reason for our conclusion is that Congress, in setting up this elaborate system of controlled cooperation in respect to rates, shipping conditions, and other matters relating to carriers in foreign trade, and committing its regulation and enforcement to a special commission, contemplated that this commission would

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strong, or, to avoid a costly struggle, they would consolidate through common ownership."

The Committee's recommendation was that the administration of the Act should be left to the Interstate Commerce Commission. That portion of the recommendation was not adopted; instead the Congress established the United States Shipping Board whose functions were later vested in the United States Maritime Commission, which in turn was succeeded by United States Shipping Board, which was in turn succeeded by the Federal Maritime Commission, the present intervener. See Historical Note at 46 U.S.C. 804.

19. Said the Court (284 U.S. at 487): "And whatever may be the form of the agreement and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.

become familiar with the problems of foreign water-borne commerce and develop considerable expertise in connection therewith.

The Act lists many standards whose application requires more than ordinary familarity with ocean transportation.[20] Thus it seems appropriate to say that the Commission is the body most qualified to decide what agreements will, or will not, "operate to the detriment of the commerce of the United States."[21] As was said in Cunard, supra, (p. 487) "Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

The Commission, so far as we are advised, has not yet acted upon the examiner's initial report; but that report discloses that the examiner has recommended the very thing suggested in the

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20. Some of the phrases used are "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports . . . or to operate to the detriment of the commerce of the United States" (Sec. 15, referring to agreements to be disapproved); "any unfair or unjustly discriminatory contract with any shipper", "other discriminatory or unfair methods" (Sec. 14); "any other unjust or unfair device or means" (Sec. 16); "any rate . . . which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States", the Commission may "order enforced a just and reasonable regulation or practice" (Sec. 17); the carrier by water must establish "just and reasonable regulations and practices" (Sec. 18).

21. Compare the following from Pan American World Airways v. U. S., at p. 309: "The 'present and future needs' of our foreign and domestic commerce, regulations that foster 'sound economic conditions,' the promotion of service free of 'unfair or destructive competitive practices,' regulations that produce the proper degree of 'competition'—each of these is pertinent to the problems arising under Sec. 411.

It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in Sec. 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under Sec. 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided in 49 U.S.C. Sec. 1486."

last quotation from Cunard—he has recommended that agreement No. 8200 be amended with changes to comply with his findings, "and that as amended Agreement No. 8200 should be reapproved."[22]

It seems to us to be wholly inappropriate that a court and jury should, while this proceeding still pends, inject themselves into this matter and undertake to say what portions of the existing agreement are good and what parts are bad.

WITH A VIEW TO UNIFORMITY IN REGULATION

Again, one prime purpose of the Shipping Act is to procure uniformity in the treatment of ocean carriers and their shippers. The Act is replete with provisions designed to avoid discrimination. See footnote 20, supra. To permit the maintenance of an action such as this would in our view produce for the shipping industry confusion worse confounded, destroy uniformity of interpretation and enforcement of the Shipping Act, and bring about the very type of discrimination which that Act was designed to avoid. We may assume that Carnation is not the only shipper who dislikes the rates fixed for shipment of its product. Carnation might win its suit and another similar concern, making a similar claim, might lose.

The undesirable results of a recovery by Carnation in such a case would be similar to those discussed by the Court in Keogh v. C. & N.W. Ry. Co., 260 U.S. 156, which was an action to

22. The final paragraph in the examiner's report is as follows: "Based upon the whole record, it is concluded, ultimately, that Agreement No. 8200 has not operated to the detriment of the commerce of the United States or otherwise contravened Section 15 of the 1916 Act, but on the other hand it has been largely beneficial to such commerce; that it should be amended to incorporate the complete agreements found herein to be outside the scope of said agreement, with such changes made therein as will comport with the findings in this decision; and that as amended Agreement No. 8200 should be reapproved."

recover damages alleged to have resulted from a combination to fix railroad rates in restraint of interstate commerce. The complaint alleged that certain uniform rates, fixed by an association of railroads, were arbitrary and unreasonable and higher than those theretofore charged and higher than they would have been if competition had not been eliminated. The rates complained of had been duly filed with and approved by the Interstate Commerce Commission. It was held that Keogh, a private shipper, could not maintain his action for damages, and the action of the lower court in dismissing the case, was affirmed. It was noted that the shipper had recourse under the Interstate Commerce Act to secure redress for damages suffered in consequence of illegal rates. The Court said: "Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act?" The Court said: "This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination —might be defeated. If a shipper could recover under Sec. 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under Sec. 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief." Since the Shipping Act vests the Commission with these extensive powers to investigate and bring to a halt the "unjustly discriminatory" and "unfair" acts prohibited and practices which "operate to the detriment of the commerce of the United States", it may be said here, in the language of Pan American World Airways, supra, "if the courts

were to intrude independently with their construction of anti-trust laws, two regimes might collide."

This necessity of attaining uniformity in the administration of a regulatory system such as here involved, was noted by Mr. Justice Brandeis in Gt. No. Ry. v. Merchants Elev. Co., 259 U.S. 285, 292, where speaking with reference to the functions of the Interstate Commerce Commission in relation to the construction of tariffs, he said that where a controversy involves any more than a pure question of law "the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained."

EXTENDING ALSO TO FOREIGN CARRIERS

Another reason why Congress must have intended to leave the resolution of the problems here present to this specialized commission is that the Shipping Act regulates not merely American shipping companies but foreign carriers as well. As noted by Marx,[23] the majority of shipping conferences are international in the sense that they consist of companies under various national flags. An examination of the list of defendants in this suit will disclose that a very large percentage of them are carriers operating under foreign flags and are foreign owned. Those carriers which are not American but which operate on routes between the United States and foreign countries are through the Shipping Act subject to a degree of regulation by this American Commission. The situation is to a degree similar to that mentioned in Pan American World Airways v. United States, supra, at p. 310, where the Court said: "Furthermore, many of the problems presented by

23. Marx, International Shipping Cartels: A Study of Industrial Regulation by Shipping Conferences, 1953, p. 137.

this case, which involves air routes to and in foreign countries, may involve military and foreign policy considerations . . ."[24]

ALL OF WHICH CALLS FOR ADMINISTRATIVE EXPERIENCE AND SPECIAL KNOWLEDGE

In its essence, the appellant's case is tied to its construction of the decision of the Court in Gt. No. Ry. v. Merchants Elev. Co., supra. Says the appellant: "As a matter of decision this case is controlled by Great Northern R. Co. v. Merchants Elevator Co., above, the case on which Cunard principally relied. This is an even simpler case. In that case there was a question of construction of a tariff. There was no need to resort to the Commission because that was a question of law. In the case at bar there is no need for construction of a tariff at all. We make a case without regard for the tariff terms, because we are concerned only with the illegal charge of $2.50 per ton above the lawful tariff whatever that tariff is."

In our view the case thus relied upon by the appellant has no relation to the problem here before us. That case had nothing to do with any problem arising under the Shipping Act. It was a simple action to recover sums paid the railway company alleged to have been collected in violation of the carrier's tariff. The sole question was whether Rule 10 of the tariff, as filed, called for a

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24. The Alexander Committee was not unmindful of this situation. Its report (V. 4 p. 416) stated: "The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors."

That the regulation of these conferences does indeed involve delicate foreign policy considerations is apparent from incidents in current history. As reported in the New York times of July 16, 1964, under Reuters dispatch from London, "Transport Minister Ernest Marples assailed the United States Maritime Commission for 'acting as if the United States has the right to regulate the affairs of the world as a whole' ". He offered a bill authorizing British ministers to order British ship lines "not to comply with American and other foreign shipping laws that the ministers consider an infringement on British jurisdiction." He was quoted as saying: "The Federal Maritime Commission claims the right to dictate to traders and shipowners in this country the form of contracts between them regardless of who owns the ships and where the contract is being negotiated."

reassignment charge of $5 a car for 16 cars of corn which were shipped from Iowa and Nebraska to a station in Minnesota where they were inspected and then rebilled to a station beyond. The sole question was what did the tariff provide and what did its text mean. As an apparent effort to suggest that the present case is like the Great Northern case, appellant asserts that this is "a simple overcharge case." We must disagree.

The whole thrust of the complaint in this case is that the defendants entered into agreements which differ from or were modifications of their filed and approved agreements, such as their Agreement 8200; that the agreements so entered into were required by law to be filed with and approved by the Commission; that this was not done; that pursuant to these unapproved agreements rates were agreed upon and fixed, and that in consequence of the failure to procure Commission approval, defendants were liable under the antitrust acts.

Cunard and Far East Conference, as we have noted, both hold that failure of approval does not affect the Commission's primary jurisdiction. But even if it did, the question would remain as to whether what defendants did amounted to agreements which required Commission approval. And that is something for the Commission to decide. If it should decide that defendants have been acting under agreements which should have been filed, but were not, the Commission under Sec. 22 of the Act, could adjudge a violation of the Act, as in Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Com'n., 9 Cir., 314 F.2d 928. And, of course, the Commission, as we shall note hereafter, might find the conduct of the defendants in respect to the rates mentioned in the complaint was wholly within and authorized by the filed and approved agreements. But in passing upon these matters the Commission must necessarily employ a specialized judgment and a determination of fact, policy and law, not within the conventional experience of a judge or jury.

The same is true of the alleged agreement not to disclose to any shipper how the members of the Conference voted on rate requests.[25] Of course the Commission may well, under its broad powers to prohibit conduct which it finds to be "unfair" or to "operate to the detriment of the commerce of the United States", adopt a rule requiring disclosure of votes at conference meetings; but a determination of that kind would represent the sort of action which may properly be committed to an administrative body rather than to a court or jury.[26]

It is complained that the members of both conferences agreed that they would make no changes in rates which had been agreed to without the concurrence of both conferences. It is plain that the arrangement provided for by agreement No. 8200 contemplated joint action in the establishment of rates. It recited that for the accomplishment of the purpose of this agreement "it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates."

The agreement provided that certain actions should be determined only by a concurrence of the two groups "with respect to the establishment or change of rates." Obviously members of the Far East Conference carrying goods from Atlantic and Gulf ports would be affected by and interested in the rates from Pacific ports. Plainly that is why Agreement 8200 was made. The provision for joint action was eminently a reasonable one.

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25. We know of no present rule requiring meetings to be public. The Alexander report mentioned "the secrecy with which agreements and conferences are now conducted," (p. 417 of the Committee Recommendations) yet no effort was made in proposing the resultant legislation to prohibit such secrecy.

26. The determination of such a policy question would necessarily take into consideration the problem of whether publication of votes at meetings would be likely to result in the shippers granting their preferences in shipments to carriers who voted for rate reduction. That decisions of this kind are commonly "carefully kept business secrets" is noted in Marx, supra, p. 141. We are not aware of any Commission ruling on this subject.

Under Sec. 18 of the Shipping Act if the Commission found that any rate was unjust or unreasonable it could prescribe a reasonable maximum rate. This, again, is a matter for determination by the Commission. But, if the two Conferences agree to an increase of $2.50 per ton on evaporated milk, such was no more than a fixing of rates as contemplated in Agreement 8200. The Shipping Act sets up a system of industry self-regulation. No power to fix or specify rates was granted to the Commission or its predecessors. In contrast with the Interstate Commerce Commission (see 49 U.S.C. Sec. 15) the Maritime Commission does not fix rates. The rates were and are fixed by the Conferences under their approved agreement subject only to the power of the Commission just mentioned to set aside unjust or unreasonable rates.

It is also complained that the agreement contemplated that when the rates were announced Pacific Westbound Conference would falsely pretend to act under its Agreement No. 57. The terms of Agreement No. 57 are not in this record. Presumably it, as do most conference agreements, authorizes the fixing of rates by the Conference. Conceivably the Maritime Commission could establish a rule requiring such a conference, when it files its rates and charges with the Commission pursuant to Sec. 18 of the Shipping Act, to specify precisely under which particular approved agreement it is operating when it fixes such rates. We know of no such rule and nothing appears to show that under either Agreement 8200 or Agreement 57 the Conferences have any obligation to specify which approved agreement they are relying upon in fixing a particular rate.

As for the claim that the defendant Conferences entered into a new agreement "contrary to the provisions of said Agreement No. 57 and said Agreement No. 8200" that a rate established or fixed by or for Pacific Westbound Conference and its members would not be changed without the concurrence of Far East Conference, we have for inquiry the question whether such an

agreement was made in fact; whether, if made, it was contrary to Agreement No. 8200; and finally, whether it would be required to be filed with and approved by the Commission.

This calls for a reference to Agreement No. 8200 which was made a part of the record before the district court. We have noted that it expressly provided for and obviously contemplated the establishment of rates by agreements between both conferences. This approved agreement expressly provided that rates should be determined only by a concurrence of the two conferences each acting as a group and in accordance with the procedures prescribed by its conference agreement with respect to the establishment or change of rates. Paragraph "second" of that Agreement was a provision that if either Conference should determine that conditions affecting its operations required an immediate change in its tariffs it could notify the other group specifying the changes it proposed to put into effect 48 hours after giving such notice, if given by telegram, or 72 hours, if given by airmail. It provided for the giving of a summary of the facts which would justify such independent action.

At the times here in controversy there was nothing in the Shipping Act as it then stood or in the then regulations of the Commission requiring an insertion of such a stipulation in a Conference agreement.[27] The stipulation in this paragraph "second" was obviously inserted by voluntary action of the signatories to Agreement 8200. Its plain reading indicates that the exercise of this right of independent action is discretionary with the conference. Nothing contained therein compels utilization of that privilege and it would appear that the Commission, when it reaches this question, might well hold that the exercise of that privilege could be waived in any particular case; or, on the other hand, the Commission might well hold otherwise; and the Com-

27. When Sec. 15 was amended, Oct. 3, 1961, Pub. L. 87-346 Sec. 2, 75 Stat. 763, it contained a new provision that no agreement should be approved between carriers not members of the same conference unless "each conference retains the right of independent action."

mission might hold with respect to the rate referred to in the complaint here that Pacific Westbound Conference merely waived its right to take that independent action as it then had the right to do. Furthermore, the Commission could well find that this waiver was a single occurrence that there was no agreement never to use that right of independent action.[28]

The important point here is that these matters presented questions of fact and of policy properly for the specialized competence of the Commission. If the Commission finds that there was a mere temporary waiver of the independent action provision, and not a permanent alteration of the agreement, then it might hold that no filing of the new agreement would be required. The Commission has long recognized that not every arrangement or understanding between carriers must be filed for approval by the Commission.[29]

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28. The examiner's report, previously mentioned, recited that Pacific Westbound Conference did in fact invoke its right of independent action on one occasion involving Korean relief cargo and one other occasion in reducing rates on Kraft liner board. This would seem to negative any agreement never to act independently. In the hearing before the examiner the Conferences' position was that their privilege of independent action should be employed only in "serious" or "important" situations.

29. Its regulation, 46 C.F.R. Sec. 222.16, provides as follows: "Statements Not Accepted For Formal Filing. Statements of routine arrangements for carrying out authorized agreements will not be accepted for formal filing by the Board but may be received as information."

In an opinion by the predecessor shipping board, reported at U.S. Maritime Commision Reports Vol. 1, p. 121, consideration was given to the question as to whether the reference in Sec. 15 of the Shipping Act to the filing of "every" agreement was intended to include all arrangements made between carriers in the routine process of carrying out their conference agreements. The Board concluded that the agreements required to be filed are to be distinguished from the mere "routine" conference activities. If what we have here should be found by the Commission to have been a mere temporary waiver by Pacific Westbound Conference of its right of independent action in respect to the rate complained of in the complaint, then the Board might hold that no agreement of a character required to be filed had been entered into. That, however, is a matter for the expertise of the Commission. For a case involving the question of what constitutes a separate agreement required to be filed, see American Export & Isbrandtsen Lines, et al., v. Federal Maritime Commission, et al., (June 24, 1964) 9 cir., ... F. 2d .....

We must therefore conclude that what is involved here is the conduct of common carriers by water whose "business involves questions of an exceptional character, the solution of which may call for a high degree of expert and technical knowledge." (284 U. S. at 485) There is first the question of what did the Conferences here actually do. This should be decided, it seems plain, by the Commission which has already entered upon such an inquiry. The next question is whether or not what was done was of such character as to require the presentation for approval of a new agreement. Here we enter upon a matter "well understood by an administrative body especially trained and experienced in intricate and special facts and usages of the shipping trade." U. S. Nav. Co. v. Cunard S.S. Co., supra, at p. 485.[30]

And finally, under the decisions and the Cunard and Far East Conference cases, even if it should be held that a new agreement had been made here which required approval of the board, the exclusive primary jurisdiction is in the Board and not in the district court.

There is one question in the background of this case which we need not meet at this time. Some doubt is raised in our minds by the language used in the concluding portions of Far East Conference where the Court said (p. 576): "Having concluded that initial submission to the Federal Maritime Board is required, we may either order the case retained on the district court docket pending the Board's action, . . . or order dismissal of the proceeding brought in the District Court." The Court then went on to say "An order of the Board will be subject to review by a United States Court of Appeals, with opportunity for further review in this Court on writ of certiorari . . . . If the Board's

30. We note in the examiner's report, previously mentioned, the following: "It is further found and concluded that the requirement that both conferences concur in matters voted on by said conferences is authorized by the approved basic agreement, and therefore is not in violation of said Section 15."

order is favorable to the United States, it can be enforced by process of the District Court on the Attorney General's application." The Court then proceeded to order the district court suit to be dismissed as was the complaint in the Cunard case, where the Court used the words "exclusive preliminary jurisdiction."[31]

This language seems to suggest that there might be circumstances under which the final determination of the Commission would be such as to lay a ground work for a later antitrust suit, perhaps where there had been a complete and egregious failure even to attempt to comply with the Shipping Act.

On the other hand, in language which we have previously quoted, the Court in Cunard suggested that the intervening agreement there referred to "might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications." We would assume that if such action were taken by the Commission no antitrust proceedings would be in order.

We do not find it necessary to resolve this question as to whether there might ultimately arise out of the situation here presented a right to relief under the antitrust laws.[32] We hold that we should, under the circumstances of this case, follow the action taken by the Supreme Court in Far East Conference and approve the dismissal of the action by the district court.

The judgment is affirmed.

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31. For a discussion of the difference between what is there called "primary exclusive jurisdiction" and "primary non-exclusive jurisdiction", see "Antitrust and Regulated Industries", 38 New York University Law Review, 604, 615.

32. The only possible reason for allowing the action to be retained on the district court docket would be to avoid a claim that antitrust action was barred by the statute of limitations. Since we hold that such an action cannot at this date be maintained, this reason is not applicable here.

United States Court of Appeals
for the Ninth Circuit

No. 18926

Carnation Company, a corporation,
Appellant,

vs.

Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, and other named persons,
Appellees.

UPON PETITION FOR REHEARING

Before CHAMBERS, POPE and JERTBERG, Circuit Judges.

Appellant's petition for rehearing discloses a failure to note the main thrust of the opinion which holds that appellant's action in the court below was properly dismissed on the ground that the matters complained of were within the primary jurisdiction of the Federal Maritime Commission.

Appellant has failed to note that we said: (immediately following the reference to footnote 16 on page 15 of the slip opinion) "In the exercise of its 'regulatory and remedial powers' to enforce the Act's 'pervasive regulatory scheme', it is for the Commission to pass upon the following questions: whether the defendants did or did not make certain agreements, whether those agreements, if made were such as to require Commission approval. . . ." Again we discuss this matter at great length (beginning at the middle of page 22 of the slip opinion, which will be the paragraph preceding West Publishing Company Key No. 5) where we said among other things: "Cunard and Far

East Conference, as we have noted, both hold that failure of approval does not affect the Commission's primary jurisdiction. But even if it did, the question would remain as to whether what defendants did amounted to agreements which required Commission approval. And that is something for the Commission to decide. If it should decide that defendants have been acting under agreements which should have been filed, but were not, the Commission under § 22 of the Act, could adjudge a violation of the Act, as in Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Com'n., 9 cir., 314 F. 2d 928. And, of course, the Commission, as we shall note hereafter, might find the conduct of the defendants in respect to the rates mentioned in the complaint was wholly within and authorized by the filed and approved agreements. But in passing upon these matters the Commission must necessarily employ a specialized judgment and a determination of fact, policy and law, not within the conventional experience of a judge or jury." The point there made was discussed, both before and after the quoted language, at considerable length.

In short, we believe that the petition for rehearing is predicated upon a misunderstanding of our opinion. The petition is denied.

/s/ RICHARD H. CHAMBERS
/s/ WALTER L. POPE
/s/ GILBERT H. JERTBERG
United States Circuit Judges

Filed Sep 28 1964
Frank H. Schmid Clerk

Appendix B

STATUTES

Appendix B

STATUTES

[Copied from U.S.C.]

Sherman Act

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* * * * (July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; 15 USCA § 1.)

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890; c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282; 15 USCA § 2.)

§ 8. The word "person", or "persons", wherever used in sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. (July 2, 1890, c. 647, § 8, 26 Stat. 210; 15 USCA § 7.)

Clayton Act

§ 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover

threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, c. 323, § 4, 38 Stat. 731; 15 USCA § 15.)

Shipping Act of 1916

[Material in brackets was removed by the 1961 amendments and matter in italics was added by those amendments.]

§ 1. When used in this chapter:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: ***Provided,*** That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District or possession there-

of, or of any foreign country. * * * (Sept. 7, 1916, c. 451, § 1, 39 Stat. 728; July 15, 1918, c. 152, § 1, 40 Stat. 900; as amended Sept. 19, 1961, Pub. L. 87-254, § 1, 75 Stat. 522; 46 USCA § 801.)

§ 14. No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the

matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense. *Provided*, That nothing in this section *or elsewhere in this chapter, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 814 of this title by the regulatory body administering this chapter, unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 814 of this title. The term "dual rate contract arrangement" as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree.* (Sept. 7, 1916, c. 451, § 14, 39 Stat. 733; June 5, 1920, c. 250, § 20, 41 Stat. 996; as amended Aug. 12, 1958, Pub. L. 85—826, § 1, 72 Stat. 574; 46 USCA § 812.)

§ 15. Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement [,] with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports

or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission [may] *shall* by order, *after notice and hearing,* disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, *or to be contrary to the public interest,* or to be in violation of this chapter, and shall approve all other agreements, modifications [,] or cancellations. *No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.*

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and main-

tain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

[Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.]

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and [All] agreements, modifications, [or] *and* cancellations [made after the organization of the Board] shall be lawful only when and as long as approved by the Commission*;* [*,* and] before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation [*.*]*; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.*

Every agreement, modification, or cancellation lawful under this section, *or permitted under section 813a of this title,* shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section *or of section 813a of this title* shall be liable to a penalty *of not more than* $1,000 for each day such violation continues, to be recovered by the United States in a civil action. (Sept. 7, 1916, c. 451,

§ 15, 39 Stat. 733; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; as amended Oct. 3, 1961, Pub. L. 87-346, § 2, 75 Stat. 763; 46 USCA § 814.)

§ 16. It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever[.]; *Provided, that within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission*

shall determine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule, or regulation.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense. (Sept. 7, 1916, c. 451, § 16, 39 Stat. 734; June 16, 1936, c. 581, 49 Stat. 1518; as amended Oct. 3, 1961, Pub. L. 87—346, § 6, 75 Stat. 766; 46 USCA § 815.)

§ 17. No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiv-

ing, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice. (Sept. 7, 1916, c. 451, § 17, 39 Stat. 734; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USCA § 816.)

§ 18. *(a)* Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the Commission and keep open to public inspection, in the form and manner and within the time prescribed by the Commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the Commission and after ten days' public notice in the form and manner prescribed by the Commission, stating the increase proposed to be made; but the Commission for good cause shown may waive such notice.

Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

(b) (1) From and after ninety days following October 3, 1961 every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, effect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge may be made therefor. The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count.

(2) No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Com-

mission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to become effective: **Provided, however,** *That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days herein specified. Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term "tariff" as used in this paragraph shall include any amendment, supplement or reissue.*

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

(4) The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foregoing commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

(6) Whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action. (Sept. 7, 1916, c. 451, § 18, 39 Stat. 735; Ex. Ord. No. 6166, §12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; As amended Oct. 3, 1961, Pub. L. 87-346, § 4, 75 Stat. 764; 46 USCA § 817.)

§ 19. Whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water, it shall not increase such rates unless after hearing the Federal Maritime Board finds that such proposed increase rests upon changed conditions other than the elimination of said competition. (Sept. 7, 1916, c. 451, § 19, 39 Stat. 735; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USCA § 818.)

§ 21. The Federal Maritime Board and the Secretary of Commerce may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment. (Sept. 7, 1916, c. 451, § 21, 39 Stat. 736; Ex. Ord. No. 6166, § 12 June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(5), 105(4), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1275, 1277; 46 USCA § 820.)

§ 22. Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The Board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter. (Sept. 7, 1916, c. 451, § 22, 39 Stat. 736; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, § 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 821.)

§ 23. Orders of the Federal Maritime Board relating to any violation of this chapter shall be made only after full hearing,

and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the Federal Maritime Board, other than for the payment of money, made under this chapter, as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Board, or be suspended or set aside by a court of competent jurisdiction. (Sept. 7, 1916, c. 451, § 23, 39 Stat. 736; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, Title IX, § 904, 49 Stat. 2016; Aug. 4, 1939, c. 417, § 1, 53 Stat. 1182; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 822.)

§ 29. In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise. (Sept. 7, 1916, c. 451, § 29, 39 Stat. 737; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 828.)

§ 30. In case of violation of any order of the Federal Maritime Board for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly

the causes for which he claims damages and the order of the Board in the premises.

In the district court the findings and order of the Federal Maritime Board shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

All parties in whose favor the Federal Maritime Board has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order. (Sept. 7, 1916, c. 451, § 30, 39 Stat. 737; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 829.)

Appendix C

COMPLAINT

In the United States District Court for the Northern District of California Southern Division

Civil Action—File No. 41153

* * * * * * *

Carnation Company, a corporation,
Plaintiff,

vs.

Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association; the following corporations, individually and as members of said associations (as hereinafter appears):[1]
Defendants.

COMPLAINT FOR DAMAGES AND OTHER RELIEF ON ACCOUNT OF VIOLATION OF THE ANTITRUST LAWS OF THE UNITED STATES

Comes now Carnation Company, a corporation, and complaining of the defendants brings this civil action against defendants based upon defendants' violation of the antitrust laws of the United States and for treble the amount of damages suffered by it by reason of defendants' violations of the antitrust laws of the United States, and in this behalf shows as follows:

1. This action is brought for treble damages and arises under the Act of Congress of July 2, 1890, c. 647, 27 Stat. 209 as amended (15 USC §§ 1-7, commonly known as the Sherman Antitrust Act), and the Act of Congress of October 15, 1914, c. 323,

1. The names of the other defendants are set out in the body of the Complaint (par. 6-8) and, accordingly, are not repeated here.

38 Stat. 730, as amended (15 USC §§ 12-27, commonly known as the Clayton Act). The jurisdiction of this Court is invoked under the provisions of said statutes and the laws of the United States in such cases made and provided.

2. This action is brought against the defendants above named and hereinafter identified. Statements herein in the present tense refer to, and are made as of, all times herein mentioned except when hereafter specific and particular times are stated.

3. Each of the defendants, except as hereinafter stated, maintains an office, transacts business, has an agent and/or is found within the above named District and Division.

4. The evaporated milk manufactured, sold and shipped by plaintiff, as hereinafter stated, regularly moves by common carrier by water from Pacific Coast ports of the United States to the Philippine Islands in commerce and trade with foreign nations. The defendants other than Pacific Westbound Conference, Far East Conference, Dennean and Galloway are herein sometimes referred to as the carrier defendants. The business of the carrier defendants is the business of providing transportation as carriers by water in commerce with foreign nations. The price fixing combination and conspiracy and the price fixing hereinafter averred was in respect of said business of said carrier defendants and operated directly in and on and restrained said business and on the transportation of evaporated milk manufactured, sold and shipped as aforesaid by plaintiff, and restrained commerce and trade with foreign nations.

5. Plaintiff, Carnation Company, is a Delaware corporation, licensed to do business and doing business in the State of California and in the above District and Division. It has its principal office in the State of California. It is engaged in the business, among other things, of manufacturing and processing fluid milk into evaporated milk, packing said evaporated milk and selling and shipping it in trade and commerce with foreign nations. More

particularly plaintiff so sells said evaporated milk to buyers in the Philippine Islands and so ships it from Pacific Coast ports of the United States to the Philippine Islands and to said buyers in the Philippine Islands by carriers by water and by carrier defendants who served said trade and who are members of the Pacific Westbound Conference. The evaporated milk shipped by plaintiff as hereinafter averred was so shipped and transported.

6. Defendants N. V. Stoomvaart Maatschappij "Nederland", Koninklijke Rotterdamsche Lloyd N. V., Skibsaktieselskapet Arizona, Skibsaktieselkapet Astrea, Skibsaktieselskapet Aruba, Skibsaktieselskapet Noruega, Skibsaktieselskapet Abaco and A/S Atlantica are corporations associated together in business and doing business under the name Java Pacific & Hoegh Lines—Joint Service. Defendants Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskapet International, Skibsaktieselskapet Mandeville and Skibsaktieselskapet Goodwill are corporations associated together in business and doing business under the name Klaveness Line—Joint Service. Defendants Dampskibsaktieselskapet Jeanette Skinner, Skibsaktieselskapet Pacific, Skibsaktieselskapet Marie Bakke, Dampskibsaktieselskapet Golden Gate, Dampskibsaktieselskapet Lisbeth, Skibsaktieselskapet Ogeka and Hvalfangstaktieselskapet Suderoy are corporations associated together in business and doing business under the name Knutsen Line—Joint Service. Defendants Skipsaktieselskapet Nordheim, Skipsaktieselskapet Vito, Skipsaktieselskapet Kirkoy, Skipsaktieselskapet Skagerek (Ditley-Simonsen Lines) and Transatlantic Steamship Company, Ltd., of Gotbenburg are corporations associated together in business and doing business as Pacific Orient Express Line—Joint Service. Defendants American Mail Line, Ltd., Mitsubishi Shipping Co., Ltd., Nippon Kisen Kaisha, Ltd. (sometimes doing business as and known as Nissan Pacific Line), Nitto Shosen Co., Ltd., Pacific Far East Line, Inc.,

Pacific Transport Lines, Inc., States Steamship Company, Transocean Transport Corp. (sometimes doing business as Magsaysay Lines), Canadian Pacific Railway Company, The East Asiatic Company, Ltd., Compagnie Maritime des Chargeurs Reunis, Orient Steam Navigation Co., Ltd., and P. & O.-Orient Lines are corporation. In and after January 1953 said defendants were common carriers by water in foreign commerce and as such provided transportation by water in such commerce from the Pacific Coast ports of the United States to the Far East, and particularly Manila in the Philippine Islands, for various commodities including evaporated milk.

7. Defendants Ellerman Lines, Limited, Ellerman & Bucknall Steamship Co. Limited, The City Line, Limited, and Hall Line, Limited, are corporations associated together in business and doing business as Ellerman & Bucknall Associated Lines—Joint Service. Defendants Nissan Kaisen Kaisha, Ltd., Toho Kaiun Kaisha, Ltd., Iino Kaiun Kaisha, Ltd., Mitsubishi Kaiun Kaisha, Ltd., and Kokusai Kaiun Kaisha, Ltd., are corporations associated together in business and doing business as Kokusai Line—Joint Service. Defendants The Bank Line, Lykes Bros. S.S. Co., Inc., Mitsubishi Kaiun Kaisha, Ltd., Orient Mid-East Lines, Prince Line Ltd. and United States Lines Company are corporations. In and after January 1953 said defendants were carriers by water from Atlantic Coast and Gulf of Mexico ports of the United States to the Far East.

8. Defendants The De La Rama Steamship Co., Inc., The Swedish East Asia Co., Ltd., The Ocean Steamship Co., Ltd., The China Mutual Steam Navigation Company, Ltd., and Nederlandschi Stoomvaart Maatschappij "Oceaan" N. V. are corporations associated together in business and doing business as De La Rama Lines—Joint Service. Defendants Skibsaktieselskapet Varild, Skibsaktieselskapet Marina, Aktieselskabet Glittre, Dampskibsinteres-

sentskabet Garonne, Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Mandeville, Skibsaktieselskapet Goodwill, Aktieselskabet Standard and Fearnley & Egers Befragtningsforretning A/S are corporations associated together in business and doing business as Fern-Ville Far East Lines—Fearnley & Eger and A. F. Klaveness & Co. A/S. Defendants Skibsaktieselskapet Igadi, Aktieselskapet Ivarans Rederi, A/S Besco and A/S Lise are corporations associated together in business and doing business as Ivaran Lines—Far East Service—Joint Service. Defendants Dampskibsselskabet Af 1912, Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg are corporations associated together in business and doing business as A. P. Moller—Maersk Line—Joint Service. Defendants A/S Den Norski Afrika-Og Australielinie, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V and A/S Tankfart VI are corporations associated together in business and doing business as Wilhelmsens Dampskibsaktieselskab. Defendant American President Lines, Ltd., Compagnie De Transports Oceaniques, Daido Kaiun Kaisha, Ltd., Isthmian Lines, Inc., Kawasaki Kisen Kaisha, Ltd., Iino Kaiun Kaisha, Ltd., Maritime Company of the Philippines, Inc., Mitsui Steamship Company, Ltd., Nissan Kaisen Kaisha, Ltd., Nippon Yusen Kaisha (also known as N. Y. K. Line), Osaka Shosen Kaisha, Ltd., Pacific Transport Lines, Inc., Philippine National Lines, Shinnihon Steamship Co., Ltd., States Marine Lines, Inc. (also known as Global Bulk Transport Corporation), States Marine Corporation, States Marine Corporation of Delaware, United Philippine Lines, Inc., Waterman Steamship Corporation and Yamashita Kisen Kaisha are corporations. In and after January 1953 said defendants were common carriers by water in foreign commerce and as such provided transportation by water in such commerce from the Atlantic Coast, Gulf of Mexico and Pacific

Coast ports of the United States to the Far East, and particularly Manila in the Philippine Islands, for various commodities including evaporated milk.

9. Before January 1953 common carriers by water in foreign commerce, providing water transportation as such from Pacific Coast ports of the United States and of Canada to the Far East (including Manila in the Philippine Islands) and as such carriers serving the trade from said ports of the United States and Canada to the Far East, associated themselves together in a conference and under and pursuant to the terms of a written agreement known as Pacific Westbound Conference Agreement No. 57 formed the defendant voluntary association and conference, known as the Pacific Westbound Conference (hereafter referred to as PWC), for the purpose of acting as a group to regulate said commerce and the transportation service of said trade and particularly for the purpose of fixing, by tariffs by and through said association and conference, the rates at which the members of said association and conference would serve said trade by transportation of commodities in said trade and commerce. PWC is a conference only of carriers serving said trade. In and by said Agreement No. 57 it was provided that PWC should fix said rates and issue a tariff thereof. Said agreement was filed for approval with, and was approved by, the United States Shipping Board agreeably to the provisions of section 15 of the Shipping Act, 1916 and thereafter remained approved and in full force and effect. Only carriers serving said trade from Pacific Coast ports of the United States and of Canada to the Far East are members of PWC. Thereafter the rates of the members of defendant PWC for transportation of commodities in said trade and commerce and from the Pacific Coast ports of the United States to the Far East (Manila, Philippine Islands, included), including the rates applicable to the transportation of evaporated milk, were fixed by

PWC acting agreeably to and under said Agreement No. 57, except as hereinafter averred.

10. In and after January 1953 the carrier defendants named in paragraphs 6 and 8 were parties to said Agreement No. 57 and members of defendant PWC. None of the carrier defendants named in paragraph 6 above was or is a member of defendant Far East Conference. In and after January 1953 defendant W. C. Galloway was Chairman of defendant PWC.

11. Since before January 1953 the members of defendant PWC were the only common carriers by water providing general cargo and regular berth service and transportation service on substantially regular routes and with regular sailings, from Pacific Coast ports of the United States to the Far East.

12. Since before January 1953 defendant PWC has maintained its headquarters and its office and has conducted its business at San Francisco, California. At no time was it a carrier or a common carrier or in the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with any common carrier by water. Its business was and is, among other things, that of investigating and accumulating data with respect to the business of transportation by water from Pacific Coast ports of the United States to the Far East, including rates to be charged for such service and of fixing rates for such service by its members.

13. Before January 1953 carriers by water providing transportation service from the Atlantic Coast and Gulf of Mexico ports of the United States to the Far East (including Manila in the Philippine Islands) and as such carriers serving the trade from said ports of the United States to the Far East, associated themselves together in a conference and formed the defendant voluntary association and conference known as Far East Conference (hereafter referred to as FEC) for the purpose, among other things, of fixing transportation rates for transportation in said trade by its members who served said trade. Only carriers serving

said trade from the Atlantic Coast and Gulf of Mexico ports of the United States to the Far East are members of said association and conference and FEC is a conference only of carriers serving said trade. In and after January 1953 the carrier defendants named in paragraph 7 and 8 above were members of said association and conference, and none of the defendants named in paragraph 7 above was a member of defendant PWC. Defendant James A. Dennean is Chairman of defendant FEC.

14. At no time was defendant FEC a carrier or a common carrier or in the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with any common carrier by water. Its business was and is that, among other things, of acting for its members in connection with the fixing of rates for transportation of commodities, by carriers by water from Atlantic Coast and Gulf of Mexico ports of the United States to the Far East as herein stated and at no time was it lawfully authorized or empowered to fix any rates from Pacific Coast ports of the United States nor was it agreed that it should have any part in fixing said rates except as averred in paragraph 18 below.

15. The carrier defendants are sued herein individually and as members of the association or associations of which they were members as herein stated.

16. The business and trade in commodities from the Atlantic Coast and Gulf of Mexico ports of the United States to the Far East is naturally competitive with the business and trade in commodities from the Pacific Coast ports of the United States to the Far East and PWC and FEC are conferences of carriers serving said different trades that are naturally competitive and would in fact be competitive and the transportation services for said different trades would be competitive and is competitive except as restrained as herein stated.

17. In November 1952 defendants, who were members of PWC, and defendants, who were members of FEC, entered into an agreement in writing, known as Agreement No. 8200, wherein and whereby it was provided that said defendant members of defendant PWC and of defendant FEC should meet and make rules for joint action by said defendants which should include "the provision of machinery for the change of any rates, rules and regulations", but wherein and whereby it was provided that defendant PWC retained the right of independent action in respect of rates and that if defendant PWC "should determine that conditions affecting its operations require" a "change in its tariffs" it might notify defendant FEC of such proposed change, specifying the change, and thereafter and after the expiration of a maximum time of 72 hours after such notice defendant PWC "may make such changes". In and by said Agreement No. 8200 it was further provided that said agreement should not apply to 12 named commodities when shipped in bulk, referred to as "excepted commodities". Evaporated milk was not specified as one of said "excepted commodities". Said Agreement No. 8200 was filed for approval by, and was approved by, the Federal Maritime Board.

18. The provisions of said Agreements No. 57 and No. 8200 notwithstanding and contrary thereto, in January 1953 defendants met at Santa Barbara, California, and then and there secretly and unlawfully associated themselves together and secretly and unlawfully combined, conspired and agreed to restrain commerce with foreign nations and to act and to fix rates for transportation of commodities, by the defendant carriers who were members of defendant PWC, from Pacific Coast ports of the United States to the Far East, not as provided in said Agreement No. 57 and not as provided in said Agreement No. 8200, and thereafter, said Agreements No. 57 and No. 8200 being still in effect, met and secretly and unlawfully renewed and continued said association,

combination, conspiracy and agreement, and so associated together and so combining, conspiring and agreeing, agreed as follows:

(a) That neither defendant PWC nor defendant FEC nor any member of either of said Conferences should disclose to any shipper information regarding rate changes and/or the position of either Conference or of any member of either Conference regarding rate requests, and agreed to a written "Joint Memorandum of Decisions" wherein and whereby it was provided "that unauthorized disclosure to shippers of information regarding rate changes and/or the position of an individual Conference or any Member thereof, regarding rate requests is contrary to the spirit of the Joint Agreement";

(b) That defendants (and not PWC alone agreeably to said Agreement No. 57) would fix and agree upon the rates for transportation of commodities by water by members of defendant PWC in said trade from Pacific Coast ports of the United States to the Far East (the Philippine Islands included) and that the rates so fixed and agreed upon should then be given out and to shippers by defendant PWC falsely pretending to act as such and under said Agreement No. 57 and should be adhered to and charged by defendants providing transportation by water from Pacific Coast ports of the United States to the Far East and the Philippine Islands;

(c) That defendant PWC, contrary to the provisions of said Agreement No. 57 and said Agreement No. 8200, would make no change in any rate established by it or fixed as aforesaid and to be charged by its members for transportation of commodities by water from Pacific Coast ports of the United States to the Far East (Manila, Philippine Islands included), without the concurrence of defendant FEC, except a rate for a commodity included in a list established by defendants acting pursuant to said secret and unlawful association, combination, conspiracy and agreement and known as a "list of initiative items" in respect of which defendant PWC

might establish rates without the concurrence of defendant FEC; and

(d) That certain specified commodities should be on the said list of initiative items.

19. The above referred to list of initiative items did not include condensed and/or evaporated milk until "Item No. 1350—Milk, condensed and evaporated" was included in said list by joint action of defendants in May 1961, as hereinafter averred.

20. The said association, combination and conspiracy referred to in paragraph 18 above never submitted to the jurisdiction of the Federal Maritime Board or its successor the Federal Maritime Commission and was never a carrier or a common carrier, by water or otherwise, and never carried on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. There was never filed with said Board or Commission nor filed with said Board or Commission for approval, nor approved by it, said agreement averred in paragraph 18 above, or a true copy thereof, or any true or complete or any memorandum thereof.

21. Defendants, associated together and combining, conspiring and agreeing as hereinabove averred and while said Agreements No. 57 and No. 8200 were in effect, did the things they had combined, conspired and agreed to do and the things hereinafter averred to have been done by them and for that purpose and for the purpose of carrying out the association, combination, conspiracy and agreement referred to in paragraph 18 above agreed upon and fixed rates for transportation by water from Pacific Coast ports of the United States to the Far East, and in so acting and issuing rates for evaporated milk as hereinafter alleged, acted by and through defendant PWC at San Francisco, California.

22. In 1951 PWC, acting agreeably to said Agreement No. 57 fixed and established the rates to be charged by its members for transportation of evaporated milk by water from the Pacific Coast

ports of the United States to the Philippine Islands. Said rates were adhered to and charged by the members of PWC except as hereinafter averred. Before May 1957 defendants, acting as alleged in paragraph 18 above, agreed that the rates for transportation by water by members of defendant PWC from Pacific Coast ports of the United States to the Philippine Islands for evaporated milk should be increased by $2.50 per ton and that defendant PWC, pretending to act agreeably to the provisions of said Agreement No. 57, should state and circulate said increase as effective May 1, 1957.

23. Before May 1, 1957, and effective as of May 1, 1957, PWC did, in fact, so announce and circulate said increase in said rates, and over plaintiff's protest defendants put into effect and applied said increased rates. In so doing defendants falsely pretended that PWC was acting lawfully and agreeably to said Agreement No. 57. In truth and in fact, in so doing, defendants were acting agreeably and pursuant to said unlawful combination, conspiracy and agreement averred in paragraph 18 above and the said agreement of defendants averred in paragraph 22 above. Said increased rates were thereafter charged and collected from plaintiff by the members of PWC for transportation by water of evaporated milk from the Pacific Coast ports of the United States to the Philippine Islands, until said rates were reduced as hereinafter stated.

24. In November 1957, plaintiff, in order to help it in meeting European competition in the sale of evaporated milk in the Philippine Islands and upon that ground which was then stated to defendant PWC, requested of defendant PWC that it reduce said increased rates on evaporated milk by $2.50 per ton and reduce them to the rates established and in effect before May 1, 1957.

25. Acting upon said request of plaintiff and on February 19, 1958, defendant PWC determined that said request should be

granted and that the said rates on evaporated milk should be reduced as requested subject, however, to the concurrence of defendant FEC and thereupon requested of defendant FEC that it concur in said reduction. Defendant FEC declined to concur in said reduction so requested by defendant PWC and defendant PWC thereupon, and agreeably to the association, combination, conspiracy and agreement hereinabove averred in paragraph 18, withdrew its said request for concurrence and no reduction in said rates was made except as hereinafter stated.

26. Thereafter defendant PWC, by writing, advised plaintiff that plaintiff's said request for reduction of the rates on evaporated milk was refused and represented to plaintiffs as follows: "The members of the Pacific Westbound Conference have given long and careful study to your request that the rate for canned milk be reduced by $2.50 per ton. * * * our member lines were initially disposed to grant a reduction in the rate * * * This position has, however, been again reviewed and the required majority of the lines are now of the view that a reduction in the ocean freight rate would not materially affect the competitive position of American versus European supplier. * * * This entire matter has nevertheless again been carefully reviewed and the members of this Conference have agreed that at this time no further downward adjustment can be made in the freight rate applicable to canned, condensed and evaporated milk in the United States to Orient trade." Said statement and representation was false, and was then known to defendant PWC to be false, and defendant PWC then knew, and it was the fact, that plaintiff's said request for reduction of rates, as aforesaid, was declined by reason of the refusal of defendant FEC to concur in the said reduction. Said statement and representation was made agreebly to the association, combination, conspiracy and agreement averred in paragraph 18, and to that part thereof that "information regarding rate changes and/or the position of an individual Conference

or any Member thereof regarding rate requests" not be disclosed to shippers.

27. Plaintiff had no knowledge of said secret association, combination, conspiracy or agreement or of the reason for said increase in the said rates on evaporated milk or of the true reason why its request for reduction of the said rates was declined, or of any facts which might have lead to the discovery of those facts until it first became aware of the facts in May 1961 through disclosure made in May 1961 in the course of a proceeding being conducted by the Federal Maritime Board and its successor and could not have discovered the same earlier by reason of the agreement of defendants that the said facts be kept secret and by reason of the fact that defendants did in fact keep them secret from shippers as they had agreed to do, and theretofore plaintiff had in fact relied upon the representations made to it by defendant PWC.

28. The said rates on evaporated milk fixed and increased as aforesaid were kept in force and effect until May 7, 1962. In May 1961, defendants agreed that condensed and evaporated milk be included on the list of initiative items hereinabove referred to, and thereupon condensed and evaporated milk were so included as "Item No. 1350 Milk, Condensed and Evaporated". Thereafter effective on May 7, 1962 defendant PWC reduced the rates on evaporated milk for transportation by water from the Pacific Coast ports of the United States to the Philippine Islands by $2.50 per ton and to the rates which had applied prior to May 1, 1957 and after May 7, 1962 the said reduced rates were charged and collected for said transportation.

29. From before May 1, 1957, plaintiff sold to buyers in the Philippine Islands and shipped to Manila in the Philippine Islands from Pacific Coast ports of the United States evaporated milk and did so by defendant carriers who were members of defendant PWC. Plaintiff was forced to so ship by said defendant carriers

by reason of the fact that said defendant carriers were the only carriers providing the type of transportation herein alleged to have been provided by them and were the only carriers by whom plaintiff, in the course of its said business, could ship to the Philippine Islands. For said shipments plaintiff was charged, and was forced to and did pay, the rates for transportation of evaporated milk fixed and made effective as hereinabove alleged. Plaintiff did not increase the price at which it sold its said evaporated milk in the Philippine Islands by reason of the said increased ocean freight rates which it was required to and did pay.

30. By reason of the premises and as a result of the aforesaid unlawful association, combination, conspiracy and agreement in violation of the antitrust laws of the United States and the aforeaverred violations by the defendants of the antitrust laws of the United States and the aforesaid exacting from plaintiff the aforesaid increase in rates on evaporated milk plaintiff has been injured in its business and property in the amount of Three Hundred Forty-three Thousand Two Hundred Seventy-six and 70/100 Dollars ($343,276.70). It has been necessary for plaintiff to employ, and it has employed, attorneys to bring and prosecute this action under the antitrust laws of the United States.

Wherefore plaintiff prays:

1. That the association, combination, conspiracy and agreement of defendants, and their conduct and acts in pursuance thereof be decreed violations of the antitrust laws of the United States; and

2. That plaintiff do have and recover from defendants its damages in the sum of Three Hundred Forty-three Thousand Two Hundred Seventy-six and 70/100 Dollars ($343,276.70) trebled to One Million Twenty-nine Thousand Eight Hundred Thirty and 10/100 Dollars ($1,029,830.10) agreeably to the antitrust laws of the United States; plus

3. Plaintiff's cost of suit, including a reasonable attorney's fee; and have

4. Such other, further and different relief as, the premises considered, is proper.

ARTHUR B. DUNNE
WALLACE R. PECK
JAMES R. BAIRD, JR.
WILLIAM H. BIRNIE
DUNNE, DUNNE & PHELPS

By /s/ ARTHUR B. DUNNE
Arthur B. Dunne

Attorneys for Plaintiff
Carnation Company

Appendix D

FEDERAL MARITIME BOARD AGREEMENT No. 8200

Federal Maritime Board
Agreement No. 8200
Far East Conference
and
Pacific Westbound Conference

Agreement made in the City of New York this fifth day of November, 1952, by and between the parties who shall execute this Agreement at the foot hereof under the caption "Members of the Pacific Westbound Conference", who are hereinafter sometimes collectively referred to as the Pacific Lines, and the parties who shall execute this Agreement at the foot hereof under the caption "Members of the Far East Conference", who are hereinafter sometimes collectively referred to as the Atlantic Gulf Lines.

WITNESSETH:

1. The Pacific Lines are parties to an agreement which has been designated Federal Maritime Board Agreement No. 57, as amended, which designates the parties thereto as the Pacific Westbound Conference; and whenever reference is hereinafter made to action which is required or permitted to be taken by the Pacific Lines, such reference is intended to refer to action such as is required to effect the establishment or change of rates pursuant to said Agreement No. 57, as amended.

2. The Atlantic/Gulf Lines are parties to an agreement which has been designated Federal Maritime Board Agreement No. 17, as amended, which designates the parties thereto as the Far East Conference; and whenever reference is hereinafter made to action which is required or permitted to be taken by the Atlantic/Gulf Lines, such reference is intended to refer to action such as is re-

quired to effect the establishment or change of rates pursuant to said Agreement No. 17, as amended.

3. The Pacific Lines operate vessels as common carriers of cargo from Pacific Coast ports of the United States and Pacific Coast ports of Canada to certain ports in the Far East; and the Atlantic/Gulf Lines operate vessels as common carriers of cargo from United States Atlantic and Gulf ports to some of the same ports in the Far East; and action taken hereunder shall apply to transportation of cargoes to all destinations which shall, from time to time, be common to the scope of both Agreements 57 and 17.

4. The purpose which the parties desire to accomplish hereby (which is hereinafter sometimes for brevity referred to as "the purpose of this agreement") is to assure to the parties hereto, as well as to the manufacturers, merchants, farmers and labor, whose products are exported from the United States to Far East destinations which may, from time to time, be common to the scope of both said Agreements 57 and 17, stability of ocean rates and frequency, regularity and dependability of service which is essential to their continued prosperity; and for the accomplishment of the purpose of this agreement it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates, except for the following commodities when shipped in bulk:

Coal	Barley
Coke	Rice
Phosphate Rock	Corn
Salt	Soya Beans
Ores	Oats
Wheat	Rye

which expected commodities are not included within the scope of this agreement.

Now, Therefore, in consideration of the premises and of the mutual undertakings of the parties hereto, it is hereby agreed as follows:

First: As promptly as possible after the approval of this agreement by the Federal Maritime Board, the parties shall hold a meeting which is hereinafter referred to as the "initial meeting." The initial meeting shall be held at a time and place to be mutually agreed upon by the parties hereto. If, however, prior to the 30th day after such approval the parties hereto shall not so have mutually agreed upon the time and place for the holding of the initial meeting, said initial meeting shall be held on the 40th day after such approval at the Fairmont Hotel in the City of San Francisco, California; and if such 40th day shall fall on a Saturday, Sunday or legal holiday, said meeting shall be held on the second business day thereafter, at the same place. Such meeting shall be attended by representatives of the Pacific Lines and of the Atlantic/Gulf Lines. All matters coming before the initial meeting for consideration and action shall be determined only by a concurrence of the Pacific Lines, acting as a group, and of the Atlantic/Gulf Lines, acting as a group, each in accordance with the procedures prescribed by its respective Conference Agreement, with respect to the establishment or change of rates. The initial meeting shall make rules, not inconsistent with the provisions of this agreement, for the conduct of all meetings to be held hereunder, and for the transaction of such other business as the parties may be permitted to conduct by virtue hereof, including the provision of the machinery for the change of any rates, rules or regulations adopted at the initial meeting or at any subsequent meeting.

Second: Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, if either group of Lines should determine that conditions affecting its operations require an

immediate change in its tariffs, it may notify the other group thereof, specifying the changes which it proposes to put into effect 48 hours after the giving of such notice if given by telegram or 72 hours after the giving of such notice if given by air mail, and a summary of the facts which justify the changes on said short notice. Forty-eight hours, or 72 hours, after the giving of such notice, dependent upon the medium by which such notice shall have been given, the notifying group may make such changes as stated in said notice and the other group may, at the end of 48 hours, or at the end of 72 hours, as the case may be, after the giving of such notice, make such changes in its tariffs as it may see fit and the action of the groups so taken shall not constitute a breach or violation of this agreement. The parties shall, however, promptly give to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, copies of any notices and information with respect to any changes in tariffs given or made as provided for in this Article Second.

Third: The parties hereto shall, promptly after the adjournment of the initial meeting and of each subsequent meeting, file with the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, a record of all business transacted at said respective meeting.

Fourth: Neither the Pacific Lines nor the Atlantic/Gulf Lines shall admit new parties to their Conference Agreement unless such parties shall simultaneously become parties to this agreement by affixing their signatures under the appropriate caption or captions at the foot of this agreement or a counterpart thereof. Whenever any party hereto shall have ceased to be a party to Agreement No. 57 as amended, or a party to Agreement No. 17 as amended, or a party to both of said agreements, as the case may be, such party by such cessation shall cease also to be a party to this agreement; but so long as such party shall continue to be a party to

either said Agreement No. 57 as amended, or Agreement No. 17 as amended, it shall also continue to be a party to this agreement. Prompt notice of the change of parties hereto shall be given by each group to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended.

Fifth: Any notice required or permitted hereby to be given shall be given by telegram if telegraphic communication be available, otherwise by air mail, and if given to the Pacific Lines shall be addressed to the Secretary-Manager of the Pacific Westbound Conference at San Francisco, California, and if given to the Atlantic/Gulf Lines shall be addressed to the Chairman of the Far East Conference, 11 Broadway, New York 4, New York. The deposit of any such notice air mail, postage prepaid, in a United States Post Office letter box, or the deposit of any such telegram in an office of any telegraphic company, as the case may be, shall constitute the giving of such notice. Each of the groups of lines may, from time to time, change the address to which notices to it are to be dispatched by notice given to the other group.

Sixth: This agreement shall become effective when, but not until, the same shall have been approved by the Federal Maritime Board, pursuant to the provisions of Section 15, Shipping Act, 1916, as amended.

Seventh: Each Line, a party hereto, shall bear the expenses of its own representatives while attending any meetings held under the provisions hereof. The expenses of hiring the places where the meetings shall be held and such expenses incidental thereto as may be for the joint benefit of all of the parties hereto, shall be borne to the extent of one half thereof by the Pacific Lines as a group and one half thereof by the Atlantic/Gulf Lines as a group.

Eighth: This agreement shall continue in effect for a period of nine months and shall continue thereafter until the ninetieth day after any one or more of the Lines, a party or parties hereto,

shall have given to the Pacific Lines and to the Atlantic/Gulf Lines and to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, notice of termination; and on said ninetieth day this agreement shall terminate and come to an end.

In Witness Whereof, the parties hereto have caused this agreement to be executed by their respective officers or representatives and duly authorized as of the day and year hereinabove first written.

[Signatures of members of the two conferences omitted]